(29,038)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 488.

CHARLES L. CRAIG, PETITIONER,

vs.

WILLIAM C. HECHT, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Petition for an Appeal. 1

Before—The Hon. MARTIN T. MANTON, United States Circuit Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner.

NOW COMES Thomas D. McCarthy, United 2
States Marshal for the Southern District of New York by his attorney, William Hayward, United States Attorney for the Southern District of New York, feeling aggrieved by the final order made and entered herein by the Honorable Martin T. Manton, Circuit Judge of the United States, on the 29th of April, 1921, sustaining the writ of habeas corpus heretofore sued out in behalf of Charles L. Craig, petitioner, and discharging the said Charles L. Craig from the custody of the United States Marshal for the Southern District of New York, and petitions this Court for an order allow- 3
ing him to prosecute an appeal from the said final order to the United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

Dated, New York, N. Y., July 25, 1921.

WILLIAM HAYWARD,
United States Attorney for the
Southern District of New York,
Attorney for Petitioner.

4 **Assignment of Errors.**

In the Matter
of
CHARLES L. CRAIG,
Petitioner.

NOW COMES Thomas D. McCarthy, respondent herein, by William Hayward, United States At-
5 torney, and in connection with his petition for an appeal says that in the record of proceedings and final order made and entered herein, error has intervened to his prejudice, to wit:

I. The Circuit Judge erred in signing and granting the paper called the writ of habeas corpus herein because the said Circuit Judge had no power or jurisdiction to grant or sign the same.

II. The said Judge erred in denying the motion made by respondent to dismiss the proceeding upon the ground that the said Circuit Judge of the United
6 States had no jurisdiction or power to grant or issue a writ of habeas corpus or discharge on a writ of habeas corpus.

III. The said Judge erred in denying the motion made by respondent to vacate and quash the paper called the writ of habeas corpus.

IV. The said Judge erred in denying the motion made by appellant to dismiss the writ and proceeding herein upon the pleadings, that is upon the petition of Charles L. Craig for writ of habeas corpus, the return thereto and the traverse of the said return.

V. The said Judge erred in overruling the objection made by appellant to the offer in evidence of Craig's exhibits one and two consisting of testimony taken in the trial of the alleged contempt and in admitting such evidence over appellant's objection and exception.

VI. The said Judge erred in overruling the objection made by appellant to the offer in evidence of the order designated by Honorable Martin T. Manton to hold the District Court and in admitting such order over appellant's objection and exception.

VII. The said Judge erred in making the order sustaining the writ of habeas corpus herein and discharging the said Charles L. Craig from the custody of the United States Marshal for the Southern District of New York.

WHEREFORE your petitioner prays that the said final order sustaining the writ of habeas corpus herein and discharging said Charles L. Craig from the custody of the United States Marshal for the Southern District of New York be reversed and that the said Charles L. Craig be remanded to the custody of the United States Marshal for the Southern District of New York to serve the sentence heretofore imposed upon him by the judgment of the Court entered herein on February 24, 1921.

Dated, New York, July 25, 1921.

WILLIAM HAYWARD,
United States Attorney for the
Southern District of New York,
Attorney for Petitioner-Appellant.

10 **Order Allowing Appeal.**

In the Matter
of
CHARLES L. CRAIG,
Petitioner.

On reading the petition of Thomas D. McCarthy, for the allowance of an appeal from the order made
11 and entered herein on the 29th day of April, 1921, sustaining the writ of habeas corpus heretofore issued in behalf of Charles L. Craig and discharging the said Charles L. Craig from the custody of the said Thomas D. McCarthy, United States Marshal for the Southern District of New York, it is

ORDERED that an appeal be and the same hereby is allowed to the said Thomas D. McCarthy from the said order as prayed for in the said petition

AND IT IS FURTHER ORDERED that the petitioner, Thomas D. McCarthy, shall have ninety
12 days within which to submit and file a statement of the evidence or bill of exceptions.

AND IT IS FURTHER ORDERED that the time within which the said petitioner shall file his record in the Circuit Court of Appeals for the Second Circuit of New York be and the same is hereby extended to the 25th day of October, 1921.

C. M. HOUGH,
U. S. Circuit Judge.

Citation.

To CHARLES L. CRAIG, Appellee:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be holden at the United States Court House and Post Office Building in the City of New York, Southern District of New York, on the 25th day of August, 1921, pursuant to an order allowing an appeal filed in the Clerk's office in the District Court of the United States for the Southern District of New York, wherein Thomas D. McCarthy, United States Marshal for the Southern District of New York is the appellant, and you are the appellee, to show cause if any there be why the said final order of the Honorable Martin T. Manton, Circuit Judge of the United States in said order mentioned should not be corrected and why speedy justice should not be done in that behalf.

GIVEN UNDER MY HAND at Hartford, Vermont, this 27th day of July, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States, the one hundred and forty-fifth.

C. M. HOUGH,
Circuit Judge of the United States.

Appellee's Appearance.

The appellee appeared specially on this appeal, giving notice in writing that he did not waive any of his rights, and did not intend thereby to submit to the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit, and that he objected to the jurisdiction of said Circuit Court of Appeals herein, and to the jurisdiction and power of the Circuit Judge, who allowed the appeal and signed the appeal, to do so.

16 **Order Sustaining Writ of Habeas Corpus.**

Before—Hon. MARTIN T. MANTON, United States Circuit Judge.

In the Matter
of
the Application of
CHARLES L. CRAIG.

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Application for discharge on a writ of habeas corpus.

At the time referred to herein, the petitioner was the Comptroller of the City of New York, duly qualified and serving as such. He was also a member of its Board of Estimate. Heretofore, the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation, the New York Consolidated Railway Company and the New York City Railway Company, all operating street railways in the City of New York, found themselves in
18 financial difficulties and receivers in equity were appointed by District Judge Mayer. The Interborough Consolidated Corporation, also a railway corporation, was declared a bankrupt and a receiver of its assets was appointed. On January 15, 1919, the City of New York, pursuant to a resolution of the Board of Estimate and Apportionment, through its Corporation Counsel, applied to the District Court for the appointment of a co-receiver in the Brooklyn Rapid Transit Cmpany suit. It was sought to have the Comptroller appointed receiver. The intention was that he would serve without

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compensation and thus look after the interests of the City of New York. The claim was that the City was interested in representing its citizens as well as protecting its rights under the various franchises granted to the Railways Corporations. The Court denied the application for the appointment of a co-receiver. This denial was upon the merits, but the opinion stated that it was "without prejudice to its renewal at such time as counsel may be advised." No further application for the appointment of a co-receiver was made before the petitioner wrote and sent the letter which is the subject of 20
the charge for contempt herein. The controversy between the officials of the City and those who had charge of the affairs of the railway companies, was very spirited. An application was made before the Board of Estimate and Apportionment for an increase in fare and this gave rise to hostility in the controversy.

Between the time of the appointment of receivers and the 1st of October 1919, expert accountants appointed by the Court, made an examination of the books and made a report as to the financial condition of the company and suggestions were made as 21
to the requirements of the company. Undoubtedly, this resulted in the application for an increase in fare.

Mr. Louis Nixon was the Public Service Commissioner for the First District of the State of New York. As representative of this Commission, and under the terms of the New York Statute, he was an interested party in the litigation. On October 1, 1919, Mr. Nixon called for a conference to be held in the City of New York on October 6th following, for the purpose of discussing the financial and physical condition of the traction lines of the City

22 of New York, including The Brooklyn Rapid Transit Company. He invited the Officials of the City of New York, including the petitioner, to this conference. On October 6th, 1919, the petitioner wrote and caused to be sent, the following letter:

"October 6, 1919.

"Hon. Lewis Nixon,
"Public Service Commissioner.

"Dear Sir:

23 "Replying to your letter of October 1st:

"Apparently without inquiry and without information, you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the Finance and Budget Committee of the Board of Estimate and Apportionment (compromising the entire Board), to drop the preparation of the largest budget in the history of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions
24 from early to late.

"In your letter you say:

"'It may be necessary to review figures and examine leases and agreements that will consume time.'

"Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the

Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

"When the applications were made to Judge Mayer in the 'friendly' proceedings instituted by those interested in these corporations for the appointment of a receiver of their own liking, if not of their own selection, the Corporation Counsel of the City of New York acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge Mayer that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just to the City of New York, and the members of the Board of Estimate and Apportionment might be accurately informed with respect thereto in order that any action deemed necessary by the City might be taken.

"As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge Mayer set himself against it. It was clearly understood that conditions were certain to develop in these receiverships where

the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief, but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.

"Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the Municipal authorities the opportunity to ascertain the truth.

The franchises and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs in the darkest scandals of Municipal history, both in the old City of New York and in the City of Brooklyn prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment, they have defied every power that has sought to open up the books and original records for search and examination in the public interest. They will open and open wide without any reservations or restrictions before there will be any conference so far as I am concerned.

"It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of the City of New York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a contest with corporate powers entrenched in darkness and concealment. 31

"The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to the City of New York any representation in these receiverships, rests upon those who procure and are protected by such orders. 32

"As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge Mayer putting the City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests. 33

"Yours very truly,

"CHARLES L. CRAIG,
"Comptroller."

The sending of this letter resulted in an information being filed charging the petitioner, as a defendant, with criminal contempt under §268 of the Judicial Code. In the information, it was charged

34 that he caused the publication of the letter not only by sending it to the Public Service Commission, but also by sending it to various newspapers published within the District. The information charges that the following statements in the letter are false:

FIRST.—The statement that the Court was responsible for a policy of denying to the defendant and other members of the Board of Estimate and Apportionment of the City of New York, any access to original sources of information concerning
35 the property and affairs of the various public utility corporations in the hands of the receivers appointed by the Court.

SECOND.—That it is stated in the letter that the Court made orders which precluded any application being made by the authorities of the City of New York to any other Court or Judge for any right of examination into the affairs or conditions of the said public utilities corporations, whereas in truth and in fact, the Court never made any such order and, on the contrary, expressly ordered
36 and directed that there should be given to the authorities of the City of New York every opportunity and facility for making such examination.

THIRD.—That it is stated in the letter that orders of the court denied to the authorities of the City of New York the opportunity to ascertain The truth, whereas in truth and in fact the court never made any such orders and has never made any orders that had such an effect.

FOURTH.—That the letter states that an order of the court stands between the public and the truth, whereas in truth and in fact no such order

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was made. That in point of fact, the court directed every facility be afforded to the public officials and citizens associations to satisfy themselves in respect to the financial and other conditions relative to the corporations in charge of the Receivers.

The charge is that the petitioner wilfully, knowingly and unlawfully and contemptuously made these statements. It is alleged that the publication was calculated and intended by the petitioner to influence the court in the consideration of the suit and proceedings then pending. Further, 38
that the purpose was to intimidate the court in the exercise of its lawful function and to force and compel it to decide applications and questions in issue in accordance with the views and wishes of the petitioner. That it was written for the purpose of inciting public ridicule, scorn and condemnation if its decisions were contrary to or at variance with the views and wishes of the defendant. That it tended to obstruct and impede the administration of justice in said suits and proceedings.

A demurrer was interposed to this information 39
alleging various grounds why it was insufficient. This was overruled. The petitioner was then held to answer in contempt before Judge Mayer. A trial was commenced May 10, 1920, and concluded on June 10, 1920, with decision reserved.

The petitioner was a witness in his own behalf. He gave testimony as to his intention and purposes in writing the letter referred to. He said the letter from Commissioner Nixon came to him on the morning of October 6th. The letter was one of the many things he had to attend to on that morning. It was written in considerable haste and the

40 writer's purpose was to "get into the mind of Nixon the necessity for that kind of cooperation resulting in the public authorities being on an equal footing with those representing the traction interests."

He said it was physically impossible for him to have attended the conference on October 6th. He didn't expect the Commissioner to read the letter at the conference and the letter was not intended for anyone else but the Public Service Commissioner. It is explained by him that the letter
41 reached the public press through a usual routine of giving out letters for publication which prevailed in the Comptroller's office. This was done through his secretary who is an appointee of and paid by the City. He further testified as to what he intended by the language employed in his letter. He said that what he meant by "original sources" was that letters and documents of the railway companies were kept in their archives and he meant by "denying" original sources, inability to have "full and unrestricted access with power to compel any subordinate to produce or dig up whatever it
42 might be, or be suspected of being, all of the facts that relate to these companies," that anything that cut us short of that was a denial of access to the original sources; and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have some one who was in a position to bring about these disclosures, and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources.

He stated how it was important to the financial interest of The City of New York and to its citi-

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zens, to have its officials well informed of the matters pertaining to the railroad company's affairs. That the most feasible and practicable way to this end was that a co-receiver be appointed who, in some way, would be representative of The City. The petitioner is a lawyer and his testimony indicates that he had at the time considerable information concerning the railroad company's affairs and its relation to The City in connection with the franchise obligation. He denied that he gave publicity to the letter other than sending it to the Commissioner. He also denied that at any time 44
he intended to convey the meaning that the District Judge had, in point of fact, denied access to original papers, except in so far as such denial might flow from refusal to appoint him co-receiver.

On February 24, 1921, the Court adjudged the petitioner guilty and sentenced him to serve a term of six months in the Essex County prison in the State of New Jersey. The petitioner in the meantime continued to perform his official duties as Comptroller. His term will not expire until December 31, 1921.

45

FRANCIS G. CAFFEY, Esq.,
United States Attorney.

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of Counsel.

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MANTON, Circuit Judge.:

The power of a Circuit Judge to issue a writ of *habeas corpus* is questioned by a motion to dismiss. I have held heretofore that a Circuit Judge has such power (In re David Lamar, N. Y. Law Journal, April 4, 1921). Nothing has been submitted in this proceeding which causes me to change the views there expressed. Further, at the time of the issuance of this writ, the Circuit Judge sitting, was by assignment empowered to consider matters
47 of original jurisdiction. The application to dismiss the writ for want of authority to issue the same is denied.

A writ of *habeas corpus* cannot be made to perform the office of a writ of error. Nor can it be invoked to review an erroneous judgment of a Court of competent jurisdiction. It challenges the jurisdiction of the Court (In re Debbs, 158 U. S., 564; Ex parte Yarbrough, 110 U. S., 651; Ex parte Watkins, 28 U. S., 193).

In a contempt proceeding, it may be available to relieve a prisoner from the restraint imposed if
48 the judgment is void on the ground that the Court was without the power to make it. But the usual objection to the remedy sought by the medium of *habeas corpus* is that there is a regular judgment of conviction which cannot be questioned collaterly. There are exceptions to this rule which have been recognized (Ex parte Lange, 18 Wall., 163; Ex parte Siebold, 100 U. S., 371).

If the Court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned col-

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laterally. The defendant, who is imprisoned under and by virtue of such a judgment, may be discharged from custody on *habeas corpus* (In re Hans Nielson, 131 U. S., 176). There the Court said:

> "In the present case, it is true, the ground for the habeas corpus was, not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other 50
> words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the Court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant" (page 183).

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In Ex Parte Lange, supra, the Court had authority to hear and determine the case. But the Supreme Court held it had no authority to give the judgment it did. As was said in the Nielson case, supra:

> "He was protected by a constitutional provision securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right."

52 So where there is a denial or invasion of a constitutional right, the prisoner may be discharged on a *habeas corpus*.

Therefore the determining inquiries are:

(a) Had the District Judge jurisdiction of the person and subject matter?

(b) Was the sentence imposed within its power?

The Judicial Code (§268, 36 Stat., 1163),
53 provides:

> "The said Courts (United States Court) shall have power * * * to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority; Provided, That such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. * * *"

In Henry vs. Henkel (235 U. S., 219), it is point-
54 ed out that there were five exceptions to the rule that there can be no review on a *habeas corpus* of a sentence which can be reviewed on appeal or by a writ of error. One of the five exceptions is where the judgment or order entered under which he is held is a nullity because in excess of the power of the Court.

An example of this exception was recently before the Supreme Court in Ex Parte Hudgings (249 U. S., 378). There on a rule to show cause, a petition of *habeas corpus* seeking the discharge of the petitioner from custody under a commitment for con-

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tempt was filed. The grounds for discharge were that the Court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible as being treated as a contempt, the action of the Court was arbitrary, beyond the limits of any discretion possessed and violative of due process of law under the Fifth Amendment. The Court said:

> "The duty to consider the case arises from the permission to file and therefore prima facie 56
> implies that it is of such a character as to be an exception to the rule of procedure, that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this Court, Ex parte Royal, 117 U. S., 254; Riggins vs. U. S., 199 U. S., 547; Glasgow vs. Moyer, 225 U. S., 420, 428; Johnson vs. Hoy, 227 U. S., 245; Jones vs. Perkins, 245 U. S., 390; Re Mirzen, 119 U. S., 584; Re Huntington, 137 U. S., 63. Whether, however, definitely the case is of such exceptional character 57
> must depend upon an analysis of the merits, which we now proceed to make upon the petition, the return, argument for the petitioner, suggestions by the United States, a statement by the Judge, and a transcript of the stenographer's notes showing what transpired in the court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record."

In the case at bar there is submitted the petition alleging, among other things, that the judg-

58 ment under which the petitioner is held, is a nullity because in excess of the power of the Court and becasue of the arbitrary action of the Court beyond the limits of any discretion possessed. The proceedings are sought to be justified by the return which is filed and the testimony taken on the hearing before Judge Mayer is made a part thereof.

It is argued on behalf of the petitioner (a) that there is no contempt either in substance or in the language of the letter of October 6th and (b) that at the time the letter was written, the subject mat-
59 ter of the criticism was not pending *sub judice.*

In the Hudgings case (supra) a witness testified who was declared by the district judge to be committing perjury. The Judge considered him in contempt of court because of his continuous refusal to recognize writings shown to him, the signature of which he said he could not identify because he had no recollection of having seen the signatory sign. The District Judge because of the peculiar circumstances of the case, thought the contrary and held that the witness was testifying falsely and that his refusal was obstructing the course
60 of justice in the presence of the Court. The Supreme Court discharged the prisoner and said:

> "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the Court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority

from construction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. Toledo Newspaper Co. vs. United States, 247 U. S., 402; Marshall vs. Gordon, 243 U. S., 521.

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly 62
be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the Court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty * * *. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt 63
power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing * * *.

"Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect."

64 The argument of the petitioner is that there was an excess of power exercised by the District Judge. That the conviction for contempt is, therefore, a nullity. He contends among other things (1) that the writing and sending of the letter does not tend to obstruct the administration of justice; (2) that at the time the letter was sent the application for the appointment of a co-receiver had been disposed of and, therefore, there was not pending before the Court a proceeding which the letter could affect by obstructing the administration of justice.

65 If either of these contentions be sound, there was an excess of power exercised in the action of the district judge and the petitioner is entitled to his discharge on this writ (Ex Parte Royall, 117 U. S., 241; Ex Parte Lange, 85 U. S., 163; New York vs. Eno, 155 U. S., 89; In re Loney, 134 U. S., 372; Ex Parte Siebold, 100 U. S., 371).

He may be discharged if on inquiry raised by the writ, it is found that the Court "has transcended its powers" (Ex Parte Parks, 93 U. S., 18).

In Ex Parte Lange (85 U. S., 163), Justice Miller said:

66

> "Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of habeas corpus or otherwise, we proceed to examine the case as disclosed by the record of the Circuit Court and the return of the marshal, in whose custody the prisoner is found, to ascertain whether it shows that the court below had any power to render the judgment by which the prisoner is held" (page 166)
>
> "There is no more sacred duty of a court than, in a case properly before it, to maintain

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unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, 68 and he should therefore be discharged" (page 178).

In Bacon's Abridgment Habeas Corpus, B10, the rule is stated:

> "if the commitment be against the law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge."

In Ex Parte Siebold (100 U. S., 371), the 69 Supreme Court approved the foregoing quotation and said:

> "The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void."

The Court must act judicial in all things and cannot transcend the power conferred by law, and when the Court does so in imposing the sentence,

70 not merely is an error committed, but the judgment is absolutely void (Bailey on Habeas Corpus, §50).

In Ex Parte Parks (93 U. S. at 22), Justice Bradley said:

> "From this review of the law it is apparent therefore, as before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should at
> 71 once be remanded, if the court below had jurisdiction of the offense, and did not act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment."

From this record, it is evident that if any contempt was committed, it was a constructive contempt as distinguished from direct contempt. The district judge in his opinion fixes responsibility of
72 guilt upon that portion of the letter written which contains a false charge that the "judge was responsible for a policy of denying to the writter and other members of the Board of Estimate any access to the source of original information concerning the property and affairs of the company." He held this to be a contempt of court within §268 of the Judicial Code, as misbehavior so near the court as to obstruct the administration of justice.

The findings of fact having any evidence to support them are binding upon an application such as this. The objectionable language of the letter is

referred to in the Court's opinion (United States vs. Craig, 266 Fed., 230):

> "Before any such conference can be seriously considered, and as an evidence of good fatih on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York."

It will be observed that the entire letter refers to the denial of the application to appoint a co-receiver. The purport of the letter taken as a whole, is a criticism of the district judge who denied the application. If the Comptroller were appointed co-receiver, he would have the access he sought as a matter of right. The finding of the district judge is that he had it as a matter of favor. Therefore, it is concluded that the statement of the denial of access is false. The district judge says in his opinion (page 231):

> "The right to criticize the correctness of the decisions of courts and judges has always existed under our form of government, and must continue to exist, not merely as a right possessed by the individual, but as a safeguard to our institutions. Such criticism often invites valuable discussion and deliberation, and not infrequently results in correcting error.

76 But such right must not be confused with 'the misbehavior * * * so near' the presence of the court 'as to obstruct the administration of justice.'"

This quotation well expresses the rule for guidance in the determination of a charge of contempt under the statute. A criminal contempt is conduct that is directed against the dignity and authority of the Court. It is an offense against organized society. Although it may arise in the course of
77 private litigation, it is not a part of the litigation but creates an issue between the public and accused. In determining whether the language used was or was not a contempt, regard must be had not merely to the very words used, but to the surrounding circumstances in connection with which they were used. The tone and the emphasis must be considered. The determination as to whether a contempt has been committed, does not depend upon the intention of the offending party, but on the act done. Such is the rule in cases of direct contempt, But in constructive contempt,
78 such as is charged here, where the language used is not *per se* libelous, but is fully capable of innocent meaning, the intention of the offending party is a factor and may control. The rule is now well settled that it is a contempt to issue a publication which is calculated to prejudice or prevent fair and impartial action in a cause of judicial investigation then pending. It is as much a contempt as if one sought to influence judicial action by threats or other form of intimidation which reflect on the Court or which tends to corrupt or embarrass the due administration of justice. (Toledo Newspaper case, supra.) But publications made

in good faith and couched in respectful language are not contemptuous. So, where the publication complained of can have no tendency to prejudice the cause, the publisher may not be found guilty of contempt. To vindicate the dignity of the Court in compelling respect and obedience, a judge may best demonstrate his title to respect by keeping within the confines of judicial obligation and not reaching out beyond his powers. To visit punishment unjustly upon another official who, acting within the limits of what he conceives to be his duty, and who attempts, whether inadvisedly or otherwise, to secure some means of keeping his employer (a municipality) advised by right of access, rather than the favor of access, to papers and information concerning the railroad properties, is clearly an excess of the power possessed.

There is no divinity about the office or duties of a judge which makes him free from criticism. The statute requires a misbehavior which causes an obstruction of the administration of justice. The Federal Constitution guarantees the right to every person to freely speak, write and publish on all subjects. The writer is responsible for the abuse of that right. Therefore, the liberty thus accorded the writer must not be confounded with mere license. The liberty of the writer stops where a further exercise would invade the rights of others. The guarantee of the Constitution does not authorize usurpation of the functions of the court. A writer with his liberty, has no right to assault a judge during the progress of a trial. When his thought and pen are used so as to constitute misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice, he invades the rights of others. There is little doubt

82 that a sentiment expressed in writing favorable or unfavorable to one of the parties in a case may be made to so prevade the community as to reach the court room and interfere with the fair and impartial consideration of a judge in the performance of his duty. But the essence of the offense is conduct reasonably calculated to produce such an atmosphere and such a result. It is well settled that where his contempt is committed without the presence of the court, every reasonable doubt will be resolved in favor of the accused. The charge
83 is quasi criminal. The language of the letter, particularly the portion which has been deemed offensive, could not in any degree, be considered misbehavior of a person "so near the presence of the court as to obstruct the administration of justice." There was but one letter. There seems to be but one paragraph which constitutes the charged misbehavior. By no interpretation can the letter be said to have any tendency to embarrass or influence the court so as to prevent a fair trial or a just conclusion in regard to any matter which was then pending before the court. Every case must be
84 measured by its own facts. To have adjudged this misbehavior "so near the presence of the court as to obstruct the administration of justice" was to exercise a power beyond the jurisdiction of the district judge.

The rule throughout, relied upon by the accuser, is the Toledo Newspaper case, supra. There the court imposed punishment for newspaper publications, but this was done on the grund that the publications obstructed justice. It was a very extreme case. It consisted of continuous and protracted attacks upon the judge. The Circuit Court

of Appeals stated (237 Fed., 986), by Judge Dennison: 85

> "Upon this record, the publications had reference to pending judicial action, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, if one should be made, and there is a finding that they constituted an attempt to intimidate—at least unduly to influence—the District Judge with reference to his decision 86
> in the matter pending before him."

And the Supreme Court (Chief Justice White, 247 U. S., 402) in its opinion quoted and approved this finding:

> " 'That each of these findings is supported by competent evidence and for that reason binding upon this court is too clear for dispute; but we may rightly go further and say that it is difficult to see how any other findings could have been made' " (page 415). 87

In that case Justice White said further:

> "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty,—a conclusion which necessarily sustains the view of the statute taken by the courts below * * *" (page 419).

The misbehavior must present an interruption which comes between the court and the considera-

88 tion of the subject matter then under submission in some way as to distract the mind of the court and pervert the course of justice, or even to divide the attention of the court. No such conclusion can be reached in the case at bar.

When a case or application is finished, the courts are subject to the same criticism as other people. In the case of Patterson vs. Colorado ex rel the Attorney General etc. (205 U. S., 454) Justice Holmes said:

89 "When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

Was there a cause pending within the rule of contempt concerning libelous publications? A cause is pending when it is still open to modifications, appeal or re-hearing and until the final judgment is rendered. Did the letter concern a cause
90 pending? If it did not, it could not obstruct the administration of justice. The application before the court which is the subject matter of the letter was the matter of a co-receiver. As to this the court had definitely decided adverse to the Comptroller. The court's action was complete in respect to this matter. It is true there is added to his opinion opportunity for another application, but this may well have been left unwritten. If a new application was made, even under suggestion of the opinion or the order, it would be necessary to do so as an entirely new application on new papers and facts. The leave granted was not one of re-

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argument. At any time upon a new showing, irrespective of the suggestion of the court, another application could have been made for the appointment of a co-receiver. Therefore, the court's action was complete in every respect and its order was entered when the letter was published. This appears by the return to the writ. The district judge pointed out, as did the information, that the whole railroad situation was before the Court, since it was an equity proceeding, but it is not of this that the defendant wrote. This is fully corroborated by the testimony of the defendant. He also testified that he had no intention of obstructing the delivery of justice or misbehaving himself so as to obstruct the administration of justice. He stands convicted upon his letter alone and such inferences as may be drawn therefrom. His conviction rests upon an issue between the Court and the defendant, and it is one of terminology or interpretation.

92

There is no criminal intent discoverable from this record to support the interruption placed upon it by the Court, nor was there pending *sub judice* a proceeding before the Court at the time the letter was written.

93

The conclusion is irresistible that the Court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty.

The petition for discharge is granted.

Dated, April 29, 1921.

MARTIN T. MANTON,
United States Circuit Judge.

94

It is Ordered that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York, in his office in the Post Office Building, in the Borough of Manhattan, City of New York, and that this order be recorded in said court.

Dated, April 29, 1921.

MARTIN T. MANTON,
U. S. Circuit Judge.

95 Filed April 29, 1921.

Writ of Habeas Corpus.

The United States of America,
Second Judicial Circuit,
Southern District of New York. } ss.:

We command you that the body of Charles L. Craig, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before Honorable Martin T. Manton, United States Circuit Judge for the
96 Second Judicial Circuit, with the Circuit and District aforesaid, to do and receive all and singular those things which the said Judge shall then and there consider of him in this behalf; and have you then and there this writ.

WITNESS the Honorable Martin T. Manton, United States Circuit Judge for the Second Judicial Circuit, this 24th day of February, 1921, and in the 145th year of the Independence of the United States of America.

MARTIN T. MANTON,
U. S. C. J.

Petition for Writ.

97

To the Honorable Martin T. Manton, Circuit Judge of the United States:

Your petitioner, Charles L. Craig, Comptroller of the City of New York and as such a member of the Board of Estimate and Apportionment in said City, humbly complaining, shows:

(1) Your petitioner is a citizen of the United States and resides in the City and County of New York, in the Southern District of New York.

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(2) Your petitioner is unjustly and unlawfully detained and imprisoned and deprived of his liberty by Thomas D. McCarthy, United States Marshal of the Southern District of New York.

(3) The facts and circumstances, upon which rested the order and commitment which were and are the cause or pretext of said detention of your petitioner, and which order and commitment are hereinafter set forth, are as follows:

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(4) On or about the 13th day of November, 1919, an information was filed in the office of the Clerk of the District Court of the United States, for the Southern District. Upon said information and the affidavits of Ben. A. Matthews and Carl Brecher, verified November 20, 1919, an order was made by Honorable Julius M. Mayer, United States District Judge, dated November 20, 1919, requiring your petitioner to show cause why he should not be declared and adjudged in contempt of this Court by reason of the facts set forth in said information. Copies of said information, af-

100 fidavit and order are hereto annexed, marked Exhibit A.

(5) On the 2nd day of December, 1919, your petitioner appeared specially, but not generally, and filed his notice of said special appearance in the form hereto annexed, marked Exhibit B, to object to the jurisdiction of his person and jurisdictionally to the sufficiency, form, validity, substance and subject matter of the order to show cause dated November 29, 1919, and information annexed
101 thereto.

(6) A hearing was thereupon had thereon and the said special appearance was overruled and disallowed and your petitioner was directed to appear and plead, to which your petitioner's counsel duly excepted.

(7) At the time specified your petitioner attended in Court involuntarily by counsel, appearing specially and not generally, and again made objection to the exercise of jurisdiction by the Court
102 and said Judge, which objection was overruled and exception noted thereto by counsel for your petitioner, whereupon your petitioner entered a general appearance involuntarily. The proceedings incident thereto were taken stenographically and transcribed, as appears by the minutes thereof, a copy of which is herewith submitted.

(8) Thereupon your petitioner, still reserving his objection to the jurisdiction of the Court, filed a motion to quash, a copy of which is hereto annexed and marked Exhibit C. Said motion to

quash was overruled by the Court in each and every respect, to which your petitioner's counsel duly excepted. 103

(9) Thereupon your petitioner filed a demurrer to the information, which after hearing was overruled and your petitioner directed to plead, to which your petitioner's counsel thereupon duly excepted. A copy of said demurrer is hereto annexed and marked Exhibit D.

(10) That thereafter and on or about the 15th day of March, 1920, your petitioner entered a plea of Not Guilty. A copy of said plea is hereto annexed and marked Exhibit E. 104

(11) Your petitioner made due and timely objection to proceeding before Honorable Julius M. Mayer, a Judge of said District Court, with respect to whom the writing which formed the basis of the informaion was written, and asked that another Judge of the District Court be designated to hear the proceeding; but the said objection and request were and each of them was overruled, to which exception was duly taken by counsel for your petitioner. 105

(12) Thereafter a hearing was had upon the said information and upon such plea of Not Guilty and witnesses were examined, exhibits introduced and the proceedings and all thereof were taken stenographically and thereafter transcribed, as appears by the minutes thereof, a copy of which is herewith submitted. Said hearing was held on and between the 10th day of May, and the 10th day of June, 1920.

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(13) Briefs of counsel were submitted on or about the 30th day of October, 1920, and on or about the 14th day of February, 1921, the Court handed down and filed its decision or opinion, a copy of which is hereto annexed and marked Exhibit F.

(14) Thereafter and on or about the 23rd day of February, 1921, the Court entered an order and the same was filed in the District Court for the Southern District of New York, a copy of which
107 is hereto annexed and marked Exhibit G.

(15) Thereafter and on or about the 24th day of February, 1921, at the City of New York in the Southern District of New York, the said Court, Honorable Julius M. Mayer, presiding, ordered and sentenced your petitioner as follows: to be imprisoned for a term of sixty days. Sentence to be executed at the Essex County Jail, Newark, N. J.

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109

At a Stated Term of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, City of New York, on the 24th day of February, 1921, in the year of our Lord one thousand nine hundred and

Present—The Hon. JULIUS M. MAYER, Judge. 110

THE UNITED STATES
vs.
CHARLES L. CRAIG.
} Contempt.

On motion of the United States Attorney, Ordered sentence.

The Court thereupon proceeds to pass judgment, and sentence the prisoner Charles L. Craig to be imprisoned for a term of sixty days. 111

Sentence to be executed at the Essex County Jail, Newark, N. J.

An extract from the minutes.

ALEX GILCHRIST, JR.,
Clerk.

(Seal.)

112

(16). Thereupon your petitioner was taken into custody by said Marshal.

(17). Your petitioner further avers:

a. That neither on the 6th nor the 7th day of October, 1919, was there pending *sub judice* before said District Judge or said Court any matter or judicial determination in any suit or proceeding mentioned in the Information or in any suit or proceeding consolidated with any or either of such
113 suits and proceeding.

b. That all orders and judicial determinations which were referred to in the letter of October 6, 1919, from your Petitioner to Lewis Nixon, Public Service Commissioner, set forth in the said Information had been previously made and concluded and that no hearing was pending, awaiting determination, upon any of said orders or judicial determinations or the subject matter thereof.

c. That the letter of October 6, 1919, from your Petitioner to Lewis Nixon, Public Service Com-
114 missioner, set forth in the said Information, was an official communication from the defendant as Comptroller of the City of New York and a member of the Board of Estimate and Apportionment of said City to the Public Service Commissioner, a public official of the State of New York, relating to the performance and discharge of their respective functions and duties and within the scope of their authority in matters committed by law to their control and supervision.

d. That the letter of October 6, 1919, from your petitioner to Lewis Nixon, Public Service Commis-

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sioner, set forth in the Information, was a privileged communication.

e. That the Information showed affirmatively that the letter therein set out and complained of was an official communication from one public official to another public official, written and dispatched of and concerning public business and with relation to their respective duties.

f. That neither the letter of October 6, 1919, set forth in the Information, nor its sending was a contempt of the authority of said Court or said Judge. 116

g. That the letter of October 6, 1919, from your Petitioner to Lewis Nixon, Public Service Commissioner, set forth in the Information, was not published or caused to be published by or at the instance or upon the procurement of your Petitioner and the proofs established that it was not so published or caused to be published.

h. That the said letter was not ever published by the defendant with the view or intent of influencing the judicial determination or decision of the Court upon or with respect to any matter or issue then pending before the District Court for judicial determination or decision and that the proofs failed to show that it was so published. 117

i. That no contempt of the authority of said District Judge or the United States District Court for the Southern District of New York has been committed by your Petitioner, and that neither the Information nor proofs showed any such contempt.

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j. That your Petitioner had not in any way obstructed the administration of justice before said Judge or in said Court, nor behaved in such a way as to obstruct or tend to obstruct the administration of justice before said Judge or in said Court, and that neither the Information nor the proofs showed any such obstruction.

k. That your petitioner, in the matters referred to in said information, had not acted in any way as an officer of said Court in official transactions
119 and had not disobeyed nor resisted any writ, process, order, rule, decree or command of said Court.

l. That the letter of October 6, 1919, from your Petitioner to Lewis Nixon, Public Service Commissioner, set forth in the said information, did not charge the court with the denial of justice nor with the denial of any right accorded by law.

m. That your petitioner had no intention to commit a contempt of said Court, nor was there any proof of any such intent.

120 n. That neither the court nor judge acquired jurisdiction of the person of the defendant.

o. That neither the court nor judge had jurisdiction of the subject matter set out in the information.

p. That the district judge exceeded his jurisdiction in making the orders, judgment, decree, and commitment made in the proceeding upon said information and each of them.

121

q. That the said court and the said district judge acted in excess of its and his powers in finding your petitioner guilty of contempt.

r. That the information upon which the proceeding against your petitioner was instituted contained no prayer for your petitioner's punishment, detention or imprisonment.

s. That the order dated November 20, 1919, based on the information upon which the proceeding against your petitioner was instituted contained no provision relating to your petitioner's punishment, detention or imprisonment and gave no notice thereof.

122

t. That the punishment was (a) excessive, (b) unusual and (c) not warranted by law or the proceedings taken against your petitioner.

u. Your petitioner has been deprived of his liberty without due process of law, in that he has been adjudged guilty of a criminal contempt without allegation or proof before the Court of any contemptuous offense.

123

v. That the letter of October 6, 1919, set forth in the said information was not written with the intention or for the purpose of influencing the action of or coming to the attention of the Court; and that neither the information alleged nor the proofs established that it was.

w. That the information does not show, nor did the proofs establish any contempt in the face of the court or constructively in its presence.

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x. That the sentence under which your petitioner is held is excessive, illegal and void.

y. That the commitment under which your petitioner is held is illegal and void.

z. That the court was without jurisdiction to impose the particular sentence under which your petitioner is held.

aa. That your petitioner's imprisonment and de-
125 tention under said sentence is contrary to the laws of the United States.

18. All of the evidence in the case is herewith submitted. The pleadings, notices, petitions, orders, minutes, papers and docket received in evidence are on file in the office of the Clerk of the United States District Court for the Southern District of New York and are by reference made a part hereof.

Annexed hereto is a transcript of the testimony of your petitioner marked Exhibit H.

126 19. Your petitioner further alleges that said order and commitment were and are void and were made without any jurisdiction in the court or the said judge to make, file or enter the same and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and without due process of law and, since being taken into custody by said Marshal, as aforesaid, has been continuously so deprived of his liberty, in violation of the Constitution of the United States, and especially the Fifth Article of the amendments thereof and in violation of the laws of the United States.

127

WHEREFORE your petitioner prays that a writ of Habeas Corpus issue directed to said Marshal as aforesaid, and that the matters and things contained be inquired of and that your Petitioner be ordered discharged from the detention and imprisonment aforesaid, and for such other and further relief as may be just.

Dated, February 24th, 1921.

CHARLES L. CRAIG,
Petitioner.

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State of New York,
City of New York,
County of New York, } ss.:

Charles L. Craig, being first duly sworn, deposes and says that he is the person named in and whose name is subscribed to the foregoing petition. That he has read and is familiar with the contents of said petition; and that the matters thereof and things therein contained are true in substance and in fact.

129

CHARLES L. CRAIG.

Subscribed and sworn to before me this
24th day of February, 1921.

ARTHUR P. LAVERY,
New York County, No. 392.
Term expires March 31, 1922.
Notary Public.

(Seal)

Filed, with Exhibits A, B, C, D, E, F, G & H attached, April 29, 1921.

130 **Exhibit A to Petition for Writ—Information for Contempt.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Of the November Term in the year of our Lord One Thousand nine hundred and nineteen.

NOW comes Francis G. Caffey, United States Attorney for the Southern District of New York,
131 pursuant to the order of this Court entered herein October 6, 1919, and respectfully informs the Court as follows:

There are, and during all the times hereinafter mentioned subsequent to the respective dates of their commencement, as hereinafter stated, there have been pending in this Court

(1) A suit, now docketed as Equity Consolidated Cause Number E-15-347, entitled "Westinghouse Electric and Manufacturing Company, plaintiff,
132 against Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, defendants," hereinafter referred to as the B. R. T. suit;

(2) A suit, now docketed as Equity Consolidated Cause Number E-16-151, entitled "The Americacn Brake Shoe and Foundry Company, plaintiff, against New York Railways Company, defendant, the Farmers' Loan and Trust Company, trustee, complainant, against New York Railways Company, Job E. Hedges as receiver of the New York Railways Company, and the American Brake Shoe

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and Foundry Company, defendants," hereinafter referred to as the New York Railways suit; and

(3) A proceeding, docketed in Bankruptcy as Case Number 26,690, entitled "In the Matter of the Interborough Consolidated Corporation, Bankrupt," hereinafter referred to as the bankruptcy proceeding.

The pleadings, notices, petitions, orders, minutes, papers and dockets in each of said suits and in said proceeding, all of which are on file in this Court, are by reference hereto annexed and made 134
a part hereof.

The B. R. T. suit was commenced by the filing on or about December 31, 1918, of a bill in equity in substance for the marshaling and conservation for the benefit of creditors of the assets of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, the defendants therein, and praying, among other things, for the appointment of a receiver of such assets. This Court had and assumed jurisdiction of the cause, and appointed Lindley M. Garrison temporary receiver on or 135
about December 31, 1918, and permanent receiver on or about January 15, 1919, of such assets. The said receiver took possession of such assets on or about the date of his appointment and has been at all times since and is now in possession thereof and is still acting as such receiver.

On January 15, 1919, the New York State Public Service Commission for the First District moved this Court for leave to intervene in the B. R. T. suit, in the name and on behalf of the City of New York, and for the appointment therein of a co-receiver. On the same day, pursuant to a reso-

136 lution of the Board of Estimate and Apportionment of the City of New York, a copy of which is hereto annexed as Exhibit A, the City of New York through its Corporation Counsel as its solicitor applied to this Court for the appointment as co-receiver in the B. R. T. suit of the Honorable Charles L. Craig, who then was and ever since has been the Comptroller and chief financial officer and a member of the Board of Estimate and Apportionment of the City of New York, and who is hereinafter called the defendant. Such motion of the
137 Public Service Commission and application of the City of New York duly came on for hearing and were argued. In its opinion disposing of the same, this Court, among other things, said:

> I do not for a moment foreclose the proposition that there may readily come in the course of this receivership a time when one or more receivers may be regarded as helpful and necessary to the Court. I can imagine that when the time comes to work out the financial future of this company, that the aid of a re-
> 138 ceiver representing at that time the united view of the public authorities, may be of great service, and I do not wish to be understood as dealing with anything but the situation as it now stands upon this 15th day of January, 1919.
>
> There may very well be a time—I repeat—when especially in dealing with the financial situation, it may become extremely helpful and co-operative to have an additional receiver, but I do not see that that time is here at the moment. At this moment what this receivership

139

is concerned with is to get down to business as fast as it can. It has already started.

* * * * * * *

In these circumstances * * * I deny the motion for a co-receiver without prejudice to its renewal at such time as counsel may be advised.

Thereafter, on January 22, 1910, this Court, in conformity with its opinion aforesaid, entered an order in part as follows:

140

The applications made herein on behalf of the City of New York and on behalf of the Public Service Commission for the First District of the State of New York for the appointment of an additional receiver or receivers herein are hereby denied without prejudice to the right to renew said applications or either of them at such time as counsel may be advised.

Decision upon the application of the Public Service Commission for the First District of the State of New York for leave to intervene as a party herein is hereby reserved.

141

Notice of all subsequent proceedings herein other than those relating to the ordinary current administration of the receivership shall be given to the solicitors for the following, namely:

The City of New York.

The Public Service Commission for the First District of the State of New York, * * *.

Pursuant to said order the Corporation Counsel of the City of New York, the solicitor for said

142 City, has been served with notice of all subsequent proceedings in the B. R. T. suit, except those relating to the ordinary current administration of the receivership, and from time to time has appeared for the city in various proceedings in said suit. The City of New York has never applied for leave to intervene in said suit, nor has it renewed its application for the appointment of a co-receiver therein.

On July 14, 1919, this Court appointed the said Lindley M. Garrison temporary receiver of the as-
143 sets of four surface street railway corporations, to wit: The Brooklyn Heights Railroad Company, The Nassau Electric Railroad Company, The Coney Island & Brooklyn Railroad Company, and The Brooklyn, Queens County and Suburban Railroad company. On August 26, 1919, this Court made said appointment permanent and consolidated the suit in which the appointment was made with the B. R. T. suit.

The New York Railways suit was commenced by the filing on or about March 20, 1919, of a bill in equity in substance for the marshaling and con-
144 servation for the benefit of creditors of the assets of the New York Railways Company, the defendant therein, and praying, among other things, for the appointment of a receiver of such assets. This Court had and assumed jurisdiction of the cause and appointed Job E. Hedges temporary receiver on or about March 20, 1919, and permanent receiver on or about March 30, 1919, of such assets. The said receiver took possession of such assets on or about the date of his appointment and has been at all times since and is now in possession thereof, and is still acting as such receiver.

145

The Corporation Counsel of the City of New York has frequently appeared before this Court, and argued applications made to this Court by others, in the New York Railways suit; and has been served with notice of all proceedings therein, except those relating to the ordinary current administration of the receivership; but the City of New York has never applied to this Court for any relief in said suit, nor applied for leave to intervene therein, nor applied for the appointment of a co-receiver therein.

146 The bankruptcy proceeding was begun by the filing in this Court on or about March 21, 1919, of an involuntary petition in bankruptcy against the Interborough Consolidated Corporation. Thereafter, on or about March 28, 1919, said corporation was duly adjudicated a bankrupt. On or about March 21, 1919, James R. Sheffield was duly appointed receiver of the assets of the said bankrupt and on or about April 25, 1919, was elected and appointed trustee of the said bankrupt estate. This Court had and assumed jurisdiction of the said proceeding. The City of New York has never filed a claim and has never appeared, nor has it 147 asked for the appointment of a co-receiver or a co-trustee, in said proceeding.

On and prior to September 1, 1919, there were involved in said suits and proceedings hereinbefore mentioned, and there were held by the receivers and bankruptcy trustee hereinbefore named, the assets of a large and substantial portion of the elevated, street surface and subway traction lines within the City of New York, particularly in the Borough of Manhattan and Brooklyn, the names of some of which lines have been above set forth.

148

Prior to September 1, 1919, pursuant to an order of this Court, Stone & Webster, experts, were employed by or on behalf of said receivers to make a report upon the financial position of the corporations and properties involved in said suits and proceeding. In the course of their work, the said Stone & Webster made a preliminary report dated September 4, 1919. Upon the coming in of such report this Court made and issued, and filed in said suits and proceeding, a memorandum, dated September 6, 1919, containing, among other things,
149 directions to said receivers and trustee of the tenor following:

> In order that the gravity of the situation may be generally made known and that some appropriate action may be taken as speedily as is consistent with full information, the Receivers are instructed to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal authorities, and to civic and taxpayers' associations of the Greater City. At the same
> 150 time, the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations to satisfy themselves in respect of the actual financial and other conditions existing in relation to the corporations now in their official charge.

On September 8, 1919, a copy of said memorandum and a copy of said report of Stone & Webster, together with a written notice from the said receivers and trustee that all of the persons and bodies to whom the same were sent would be afforded every facility to satisfy themselves in re-

151

spect of the actual financial and other conditions existing in relation to the corporations then in the official charge of such receivers and trustee, were mailed to the defendant and to others, in accordance with this Court's direction in said memorandum, and on or about September 9, 1919, the said copies of such report and memorandum and the said notice were received by the defendant. A copy each of said report, memorandum and notice is hereto annexed as Exhibits B1, B2 and B3, respectively, and made a part hereof.

152

Neither the defendant nor any member or members of the Board of Estimate and Apportionment, nor any other authorized representative, of the City of New York has ever been denied by this Court, or by any one acting under its authority, or by either of said receivers or by the said trustee or by any authorized representative of either of said receivers or of said trustee, access to any original or other source of information concerning any of the property or affairs of any public utility corporation holding any franchise from, or any franchise to operate over, on or under any street of, the City of New York.

153

On October 1, 1919, the Honorable Lewis Nixon, Public Service Commissioner for the First District of the State of New York, called a conference, to be held at his office in the Borough of Manhattan, City of New York, on Monday, October 6, 1919, for the purpose of discussing the financial and physical condition of the traction lines in the City of New York, including those involved in the said suits and proceeding pending in this Court, and considering any suggestions that might be made by the conferees with respect to the future of said

154 lines and the relations between them and the City of New York. To said conference the said Commissioner invited the officials of the City of New York, the officials of said traction lines, and the said receivers and trustee or their counsel. On or about October 2, 1919, the defendant received an invitation to said conference, dated October 1, 1919, a copy of which is marked Exhibit C and hereto annexed and made a part hereof.

On October 6, 1919, at and within the City, County, State and Southern District of New York,
155 and within the jurisdiction of this Court, the defendant Charles L. Craig, who was then Comptroller and chief financial officer and a member of the Board of Estimate and Apportionment of the City of New York as aforesaid, and an attorney-at-law, well knowing all the facts hereinbefore alleged, wilfully, knowingly, unlawfully and contemptuously did, in response to the invitation aforesaid, write to the Honorable Lewis Nixon, Public Service Commissioner, as aforesaid, a letter of the following tenor, to wit:

156 October 6, 1919.

Hon. Lewis Nixon,
Public Service Commissioner,
No. 49 Lafayette Street,
New York City.

Dear Sir:

Replying to your letter of October 1st:

Apparently without inquiry and without information, you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the

157

Finance and Budget Committee of the Board of Estimate and Apportionment (comprising the entire Board), to drop the preparation of the largest budget in the history of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late:

In your letter you say:

"It may be necessary to review figures and examine leases and agreements that will consume time."

158

Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

159

When the applications were made to Judge Mayer in the "friendly" proceedings instituted by those interested in these corporations for the appointment of a Receiver of their own liking, if not of their own selection, the Corporation Counsel of The City of New York acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge Mayer that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the cor-

160 porations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just to The City of New York, and the members of the Board of Estimate and Apportionment might be accurately informed with respect thereto in order that any action deemed necessary by the City might be taken.

As you must be aware, it is a very common
161 thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge Mayer set himself against it. It was clearly understood that conditions were certain to develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire sub-
162 ject. Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.

Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the Municipal authorities the opportunity to ascertain the truth.

163

The franchise and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs and the darkest scandals of Municipal history, both in the old City of New York and in the City of Brooklyn prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the 164
present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interest. They will open and open wide without any reservations or restrictions before there will be any conference so far as I am concerned.

It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile in every interest of The City of New 165
York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a contest with corporate powers entrenched in darkness and concealment.

The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to The City of New York any representation in these receiverships, rests upon those who procured and are protected by such officers.

166 As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge Mayer putting The City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

167 Yours very truly,

Charles L. Craig,
Comptroller;

and did cause the said letter to be delivered to the said Public Service Commissioner and to the persons attending the said conference at the said office of said Public Service Commissioner, and did cause the same to be published in various newspapers including on October 6, 1919, The Evening Post, The Evening Mail, The Evening Sun, The Evening
168 World, The Globe and Commercial Advertiser, and The Evening Telegram, and on October 7, 1919, The New York Times, The World, New York Tribune, The Sun, New York American, and New York Evening Journal, all of which newspapers then were and long prior thereto had been of general circulation and widely read by the public within and throughout the Southern District of New York.

1. In said letter it was stated that this Court in the said suits and proceeding was responsible for a policy of denying to the defendant and to other members of the Board of Estimate and Apportion-

ment of the City of New York any access to original sources of information concerning the property and affairs of the various public utility corporations in the hands of receivers appointed by this Court and holding franchises to operate in the streets of New York; whereas, in truth and in fact this Court never adopted such a policy, but on the contrary afforded to the defendant and to all members of the Board of Estimate and Apportionment of the City of New York access to the said original sources of information and every facility for obtaining information concerning the property and affairs of the said corporations and expressly directed that the City of New York and its officials should have access to such information, and in truth and in fact at no time since this Court assumed jurisdiction of any of said corporations as aforesaid has this Court or any one acting under its authority ever denied to the defendant or to any member of the Board of Estimate and Apportionment, or to any authorized representative of the City of New York or of any of its officials, access to original or to any other sources of information concerning the property or affairs of any of said corporations.

2. In said letter it was stated that this Court made orders which precluded any application being made by the authorities of the City of New York to any other Court or Judge for any right of examination into the affairs or conditions of the said public utility corporations; whereas, in truth and in fact this Court has never made any such order, and on the contrary, prior to the writing of said letter, this Court expressly ordered and directed

172 that there should be given to the authorities of the City of New York every opportunity and facility for making such examination.

3. In said letter it was stated that the orders of this Court denied to the authorities of the City of New York the opportunity to ascertain the truth; whereas, in truth and in fact this Court has never made any such order, and has never made any order that has, has had, or could have such effect, but on the contrary prior to the writing of said letter
173 this Court ordered and directed that there should be afforded to the authorities of the City of New York every opportunity and facility for ascertaining the truth.

4. In said letter it was stated that an order of this Court stands between the public and the truth; whereas, in truth and in fact no order that this Court has made has, has had, or could have such effect, but on the contrary every order in the above mentioned suits and proceeding tended and was designed to place the public in possession of
174 the truth, and prior to the writing of said letter this Court expressly ordered and directed that every facility be afforded to public officials and citizens' associations to satisfy themselves in respect of the financial and other conditions existing in relation to the corporations in charge of said receivers.

All of the foregoing statements in said letter, numbered from 1 to 4 inclusive, and each of them, are and were false and were *known by the* defendant to be false when made and were made in reckless disregard of the truth.

175

In addition to the statements above enumerated, the defendant by such letter intended to charge and wilfully, knowingly, unlawfully, falsely and contemptuously therein and thereby did charge that this Court concealed the truth from the public and officials and kept hidden facts which, in order to protect the public interests, should have been known to the public and public officials; whereas, in truth and in fact this Court did not conceal the truth or keep any facts hidden from the public or from any public official, but on the contrary prior to the writing of said letter this Court ordered and 176 directed that there should be given to the public and public officials every opportunity to ascertain the truth and every facility which might aid in revealing the truth, and caused the Corporation Counsel for the City of New York to be served with notice of all proceedings in said suits other than those relating to the ordinary current administration of said receiverships.

The said letter, as well as the publication thereof as aforesaid, each tended and was calculated and intended by the defendant to influence this Court in its consideration of suits and proceeding afore- 177 said, pending when said letter was written, delivered and published as aforesaid and still pending in this Court, to intimidate this Court in the exercise of its lawful functions, to force and compel this Court to decide applications, questions and issues in such suits and proceeding in accordance with the views and wishes of the defendant, to threaten this Court with and to incite public ridicule, scorn and condemnation of it if its decisions were contrary to or at variance with such views and wishes of the defendant, to misrepre

178 sent this Court's actions and its reasons for acting as it had acted and was acting in said suits and proceeding, to obstruct the enforcement of this Court's orders herein, to incite and cause public disregard of and resistance to such orders, to bring this Court into public condemnation, obloquy, odium, scorn and contempt, and to obstruct and impede the administration of justice in said suits and proceeding, and in all other actions, suits and proceedings in this Court; against the peace of the United States and their dignity and contrary to the form
179 of the statute of the United States in such case made and provided and in contempt of this Court (Judicial Code of the United States, Section 268).

FRANCIS G. CAFFEY,
United States Attorney.

Exhibit A.

180 WHEREAS, the people of the City of New York have invested in the construction of the Rapid Transit Subway Railroads provided by Contract No. 4 between the City and the New York Municipal Railway Corporation the sum of over $124,000,000; and

WHEREAS, there are now existing claims by the City against the Brooklyn Rapid Transit Company and its subsidiary companies for unpaid paving charges, percentages, car license fees, taxes, etc., amounting to over $11,000,000; and

WHEREAS, an action has been brought by the Westinghouse Electric and Manufacturing Com-

pany in the United States District Court, Southern District of New York, against the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company to recover about $40,000, and the said companies have admitted their inability to pay said claim; and 181

WHEREAS, in said action and under the said admission and with the consent and approval of defendants in said action, on the 31st day of December, 1918, Lindley M. Garrison was appointed receiver of the property of said Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company and is now in actual possession of the property owned by the City of New York, representing an expenditure of over $124,000,000 of the people's money, including said Rapid Transit Subway properties operated or to be operated by said Municipal Railway Corporation or its assignee, the New York Consolidated Company, under said Contract No. 4, by an order duly made and entered on that day by Judge Julius M. Mayer, of the United States District Court, Southern District of New York; and 182 183

WHEREAS, it is of the utmost importance that the rights of the City, its taxpayers and its people should be protected and secured to the utmost advantage during said receivership, in view of the vast sums of money now invested in said properties by the people or due by said companies to The City of New York, it is therefore

RESOLVED, that the Corporation Counsel be and he hereby is instructed to appear on the return

184 day of said order appointing the said Lindley M. Garrison as such receiver, to wit, January 15th, 1919, and for and in the name of The City of New York then and there to ask for the appointment of the Comptroller, Charles L. Craig, the chief financial officer of The City of New York, as co-receiver in the said suit now pending in the said United States District Court.

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185 **Exhibit B1.**

COPY.

STONE & WEBSTER
120 Broadway, New York

September 4, 1919.

Honorable Julius M. Mayer,
United States District Judge,
New York City.

186 Dear Sir:

In compliance with your request for information regarding the effect which the recent increase in wages will have upon the financial position of the properties in charge of your Receivers, we give you below, our estimate of the operating results of the various properties for the twelve months beginning September 1, 1919.

We may add that the various operating officials are in substantial accord with our conclusions:

187

SURFACE LINES IN MANHATTAN (NEW YORK RAILWAYS COMPANY) IN CHARGE OF RECEIVER HEDGES:

For the twelve months the aggregate operating deficit of these lines will be about $1,113,000

SURFACE LINES OF BROOKLYN IN CHARGE OF RECEIVER GARRISON:

For the twelve months the aggregate operating deficit of these lines will be about 1,268,000

188

Total Operating Deficit of these Surface Lines of the two Boroughs for the twelve months 2,381,000

This means that the income of these surface lines will fail by about $200,000 per month to provide actual operating expenses and taxes *without any provision for bond interest, rentals and other fixed charges,* and will fail by about $853,000 per month to earn these fixed charges.

Upon the basis of the present cost of materials, and supplies, rates of wages and fares, there is no prospect that these surface lines will earn their operating expenses and taxes for years to come, if ever.

189

SUBWAY AND ELEVATED LINES IN MANHATTAN OPERATED BY INTERBOROUGH RAPID TRANSIT COMPANY, WHOSE STOCK IS IN THE HANDS OF JAMES R. SHEFFIELD, TRUSTEE IN BANKRUPTCY, OF THE INTERBOROUGH CONSOLIDATED CORPORATION.

These lines, which in the fiscal year 1917, earned a surplus of $8,885,358.52 above all fixed charges,

190 will for the next twelve months fail to earn fixed charges including the interest on the Company's $200,092,000 of outstanding bonds and notes (most of which were issued to provide for the Company's share of the cost of the Subways) by about $9,880,000

ELEVATED AND SUBWAY LINES IN BROOKLYN (BROOKLYN RAPID TRANSIT COMPANY) IN CHARGE OF RECEIVER GARRISON:

191 These lines, which in the fiscal year 1917, earned a surplus of $1,523,457 above all fixed charges, will for the next twelve months (after the payment of interest upon the recently issued Receiver's Certificates and upon the underlying mortgages) fail to earn the interest on the Company's $60,000,000 of outstanding bonds and notes issued to provide in part for the Company's investment in the new Subways by about $2,798,000

Upon the present basis of prices for materials and supplies, rates of wages and fares, there is no
192 hope that the Elevated and Subway Lines of either Borough will earn interest upon the Companies' investment in the Subways for many years to come, if ever.

Yours very truly,

(Signed) STONE & WEBSTER.

193

Exhibit B2.

UNITED STATES DISTRICT COURT,

Southern District of New York.

WESTINGHOUSE ELECTRIC and MANUFACTURING COMPANY,

Plaintiff,

against

BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY,

194

Defendants.

THE AMERICAN BRAKE SHOE and FOUNDRY COMPANY,

Plaintiff,

against

NEW YORK RAILWAYS COMPANY,

Defendant.

IN THE MATTER

195

of the

INTERBOROUGH CONSOLIDATED CORPORATION

Bankrupt.

CENTRAL UNION TRUST COMPANY OF NEW YORK,

Plaintiff,

against

BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION, NEW YORK CONSOLIDATED RAILROAD COMPANY and LINDLEY M. GARRISON as Receiver, etc., et al.,

Defendants.

196

Exhibit B2.

MAYER, District Judge:

Messrs. Stone & Webster, acknowledged experts of high standing, were employed some months ago by direction of the Court, to undertake, among other things, an investigation of the financial condition of the properties affected by the receiverships pending in this court. This independent expert inquiry is now nearing completion and the
197 Court is awaiting the final report of Messrs. Stone & Webster, in respect of essential features of the transportation problems, including questions relating not only to financial conditions, but also to operation, property valuations and other important subjects.

Since this inquiry was begun, the financial difficulties of the roads have grown greater instead of less. The recent increase in wage cost made necessary the request by the Court for immediate information, to which Messrs. Stone & Webster have answered, as appears by their letter, a copy of
198 which is annexed.

This report, especially the statement that the surface lines in the charge of the Court's Receivers are failing by about $200,000 a month to earn their actual operating expenses, indicates a grave and immediate crisis. It is impossible to forecast the serious results which lack of financial aid may bring about, affecting most vitally the welfare of the people of the City of New York. Manifestly lines cannot long be operated at an actual loss. The problems involved press for calm and serious consideration and an earnest and united effort toward prompt solution. That some means must

be devised for at least temporary relief seems plain and urgent. 199

That plans should be worked out for determining the permanent status of the transportation companies and their legal and financial relations to the State and Municipal Governments, seems an obvious duty, the performance of which should be promptly undertaken.

The legal, financial and governmental questions involved are numerous and intricate and, naturally, there are differing views as to the wise and proper policies to be adopted. 200

Because the problems presented are so grave and the emergency is so pressing, and disaster so imminent, every good citizen must feel that the effort to solve these problems should be undertaken promptly and as nearly free from controversy, political or otherwise, as possible.

In order that the gravity of the situation may be generally made known and that some appropriate action may be taken as speedily as is consistent with full information, the Receivers are instructed to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal authorities, and to civic and taxpayers' associations of the Greater City. At the same time, the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations to satisfy themselves in respect of the actual financial and other conditions existing in relation to the corporations now in their official charge. 201

Meanwhile, it is earnestly hoped that all who have official duties to perform, whether by State, Municipal or Legislative action, will reserve their judgment and conclusions on the fundamental

202 questions involved, until they shall have had adequate opportunity to satisfy themselves of the facts and of the real conditions existing. Such a course will enable all concerned to arrive at a just determination, based (as all just determinations must be), on an accurate knowledge of the facts.

JULIUS M. MAYER,
District Judge.

September 6, 1919.

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203 **Exhibit B3.**

New York, N. Y.,
Sep. 8th, 1919.

Dear Sir:

Pursuant to the direction of Judge Mayer of the United States District Court, we beg to send you herewith his memorandum with letter of Messrs. Stone and Webster attached.

At the same time we desire to state that every facility will be afforded to you to satisfy yourself in respect of the actual financial and other con-
204 ditions existing in relation to the corporations now in our official charge.

Respectfully yours,

LINDLEY M. GARRISON,
Receiver,
Brooklyn Rapid Transit Company.

JOB E. HEDGES,
Receiver,
New York Railways Company.

JAMES R. SHEFFIELD,
Trustee,
Interborough Consolidated Corporation.

205

Exhibit C.

October
First
1919

Hon. Charles L. Craig,
Comptroller and Member of the Board of
Estimate and Apportionment,
Municipal Building,
New York, N. Y.

Sir:—

206

As an outcome of to-day's hearing on the separation of lines from the New York Railways Company, I feel that it is my duty to invite you to attend a conference of all parties at interest in the transit situation.

My position since taking office has been that in case any concessions were granted by the City that concessions in return should be made by the Companies, such concessions to be of a nature that will induce the City Government to grant relief.

We are face to face, not only with vast losses to the people of the City, but with lowering of the standard of service, physical deterioration of property and equipment and demoralization of organization. 207

Had the matter received constructive and businesslike handling four months ago the present crisis could have been avoided and the great system of free transfers saved to the traveling public.

For temporary concessions extended to the companies great and lasting benefits could have been secured to the people of the City.

208

Efficient transportation is the life of our industrial and commercial enterprises. The disintegration already precipitated will lead to expense, inconvenience and confusion for the traveling public and almost insurmountable difficulties in regulation. And even worse is to come.

No one surely will assume the fearful responsibility of refusing to aid in mending this condition. The people of the City deserve better treatment as burdens are being fastened upon them that it will take many years to lift and some time even to
209 lighten.

I suggest a preliminary meeting at the offices of the Commission next Monday morning at ten-thirty o'clock.

The traction companies I beg to take counsel and present such plans as they think will prevent further collapse and that will in addition weld together the parted units, to the end that co-operation may be secured to at least as full an extent as existed before the receiverships began. They must be prepared to make drastic concessions for any favors received.

210

Order to Show Cause. 211

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

CHARLES L. CRAIG.

212

On the information filed herein on November 13, 1919, a copy of which is hereto annexed, and the affidavit of Carl Brecher verified November 20, 1919, and the affidavit of Ben A. Matthews verified November 20, 1919, it is

ORDERED that the above named defendant, Charles L. Craig, show cause before me at Room 235 Old Post Office Building, Borough of Manhattan, New York, N. Y., at 2:30 P. M. on December 2, 1919, why he should not be declared and adjudged in contempt of this Court by reason of the facts set forth in said information. 213

Dated, New York, November 20, 1919.

JULIUS M. MAYER,
U. S. District Judge.

214 **Affidavit.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

CHARLES L. CRAIG.

215 Southern District of New York, ss.:

Carl Brecher, being duly sworn, deposes and says:

I am over the age of twenty-one years and am employed as a clerk in the office of the United States Attorney for the Southern District of New York. On November 12, 1919, I went to the office of the defendant, Charles L. Craig, Comptroller of the City of New York, in the Municipal Building, Borough of Manhattan, New York City, and went to the reception room leading to the private office
216 of the said defendant, Charles L. Craig. I there delivered a copy of the annexed letter to the man in charge of the said room and told him that the letter was important and related to a contempt proceeding. He said that he would deliver it to the defendant, Charles L. Craig

CARL BRECHER.

Sworn to before me this
20th day of November, 1919.

SAML. N. HITCHCOCK,
United States Commissioner,
Southern District of New York.

217

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

CHARLES L. CRAIG.

218

Southern District of New York, ss.:

Ben A. Matthews, being duly sworn, deposes and says:

I am Assistant United States Attorney for the Southern District of New York. On November 12, 1919, I delivered a copy of the annexed letter to Carl Brecher, a clerk in the office of the United States Attorney for the Southern District of New York, and instructed him to deliver the copy to the defendant, Charles L. Craig. The said defendant has not replied in any way to the said letter.

219

BEN A. MATTHEWS.

Sworn to before me this
20th day of November, 1919.

CARL BRECHER,
Notary Public,
Kings County,
Clerk's No. 466. Register's No. 1213,
N. Y. Clerk's No. 569, Reg's No. 1560,
Commission expires March 30, 1921.
(Seal)

Letter of Francis G. Caffey.

November 12, 1919.

Honorable Charles L. Craig,
Municipal Building,
New York City.

Sir:

I am about to file an information against you for contempt of court under Section 268 of the Judicial Code of the United States. Pursuant to similar practice in other like cases, this informal notice is given you in order that you may if you desire have your attorney arrange with me a time for your appearance in court. If you, adopt this suggestion it will not be necessary for me to have process for your production in court issued to the Marshal.

I shall await word from you until Thursday, noon, November 13, 1910.

You or your attorney will upon request be furnished with a copy of the information by this office.

Respectfully,

(Sg'd) FRANCIS G. CAFFEY,
United States Attorney.

Exhibit B to Petition for Writ—Notice of Special Appearance. 223

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

CHARLES L. CRAIG.

224

To

ALEXANDER GILCHRIST JR.,
Clerk of the District Court of the
United States
For the Southern District of New York.

Sir:

Charles L. Craig, Comptroller of The City of New York and as such a member of its Board of Estimate and Apportionment appears specially, but not generally, to object to the jurisdiction of his person and jurisdictionally to the sufficiency, form, validity, substance and subject matter of the Order 225 to Show Cause dated November 20, 1919, and Information annexed thereto.

Dated, New York, December 2, 1919.

WILLIAM P. BURR,
Corporation Counsel of
The City of New York,
Attorney for Defendant,
Appearing Specially,
Municipal Building,
Borough of Manhattan,
City of New York.

EDMUND L. MOONEY,
Special Counsel with
The Corporation Counsel of

226 **Exhibit C to Petition for Writ—Motion to Quash Information for Contempt.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

227 CHARLES L. CRAIG.

Comes the Respondent, Charles L. Craig, and appearing specially in this cause, by William P. Burr, Corporation Counsel, his attorney, and Edmund L. Mooney and William E. C. Mayer, his counsel, and for the purpose of challenging the jurisdiction of the Court and the legality and sufficiency of the information, files this his motion to quash the same and dismiss the proceeding, on the ground that the Court has no jurisdiction over the
228 respondent to proceed herein, and on the ground that the information on its face shows that he should not be further held to plead or answer thereto and for separate and several grounds of this motion and for special causes why the quashal and dismissal prayed for should be allowed and entered, he sets down and assigns separately and severally the following:

1st. The court is without jurisdiction.

2nd. The court has no jurisdiction of the person of the respondent.

229

3rd. The information does not sufficiently inform the respondent what he is called upon to defend against.

4th. The information is insufficient in that it attempts by reference to other papers or writings to make a complaint or accusation against the respondent and does not embody in the information itself the recitals or parts of said other writings or papers relied upon, so as to show the respondent clearly what he is called upon to respond to.

230

5th. Because the information recites matters and things shown upon its face not to be within the personal knowledge of the United States Attorney, and does not aver that he charges or presents them upon information and belief.

6th. Because the information contains averments of fact not within the personal knowledge of the United States Attorney and is not verified.

7th. Because the information is not verified.

8th. Because the information does not charge the 231
respondent with any offense.

9th. Because the information on its face shows that the respondent is not therein charged with any misbehavior in the presence of the Court.

10th. Because the information shows on its face that the respondent is not charged with any misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

232

11th. Because the information does not show any contempt in the face of the Court or constructively in its presence.

12th. Because the information, when construed most strongly against the pleader, does not aver or show that any publication was made by the respondent of or concerning the court.

13th. Because the information shows on its face that the letter set out therein was a privileged com-
233 munication.

14th. Because the information shows that the letter therein set out and complained of was an official communication from one public official to another public official, written and dispatched of and concerning public business.

15th. Because the information does not show that the letter therein set out and complained of was written with a view of influencing the court with respect to the decision of any matter or issue then pending before the court for decision or judicial
234 determination.

16th. Because the averments of the information show on their face that the letter therein set out and complained of was not written for the purpose of obstructing the administration of justice.

17th. Because the averments of the information do not show any criticism of the Court with respect to a cogitation of the court then in process of development.

235

18th. Because it does not sufficiently appear from the averments of the information that the publication of the letter set out and complained of was ever authorized by the respondent.

19th. Because it does not sufficiently appear from the averments of the information that the letter therein set out and complained of was ever authorized by the respondent to be published with the intent or view of obstructing the administration of justice.

236

20th. Because it does not sufficiently appear from the averments of the information that the letter therein copied and complained of was ever by this respondent authorized to be published with the view and intent of influencing the judicial determination or decision of the Court upon or with respect to any matter or issue then pending before the court for judicial determination or decision.

21st. Because for aught that appears in the information the letter from the respondent as Comptroller to Nixon as Commissioner was itself, as a matter of law, a public document which the respondent was powerless to suppress or withhold from publication.

237

22nd. Because the averments of the information are vague, uncertain and indefinite.

23rd. Because the averments of the information are incomplete and unintelligible, except when assisted by other outside or collateral papers or writings, the parts of said outside papers so necessary to be referred to not being copied or set out in the information.

238

24th. Because the information is entirely insufficient in law.

25th. Because the averments of the information show nothing done, said, written or published by the respondent which calls in question or amounts in law to contempt of the authority of the Court.

26th. Because the information does not contain any sufficient or appropriate prayer.

239 27th. Because the information does not contain any sufficient or appropriate prayer for process.

28th. Because the information does not contain any sufficient or appropriate prayer for punishment.

WHEREFORE, respondent prays judgment of the Court upon the said information and that the same be quashed and dismissed and that he be not required to further demur, plead or answer thereto.

WILLIAM P. BURR,
Corporation Counsel,
240 Attorney for the Motion.

EDMOND L. MOONEY,
WM. E. C. MAYER,
Counsel for the Motion.

Stipulation of Adjournment. 241

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

CHARLES L. CRAIG,
Defendant.

242

Owing to the illness of the defendant herein, it is herewith stipulated, subject to the approval of the court, that the proceedings herein be adjourned without prejudice to either party, until January 17, 1920, at 10:30 A. M., at Room 235 Federal Building.

Dated, New York, January 7, 1920.

WILLIAM P. BURR,
Corporation Counsel Attorney for Defendant
By Edmund L. Mooney of Counsel. 243

FRANCIS G. CAFFEY,
United States Attorney.

Agreeably with the above stipulation, it is

ORDERED that the proceedings herein be adjourned without prejudice to the time and place in said stipulation set forth.

Dated, New York, January 7, 1920.

JULIUS M. MAYER,
D. J.

244 **Exhibit D to Petition for Writ—Demurrer to Information for Contempt.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

245 CHARLES L. CRAIG.

Comes the Respondent, Charles L. Craig, by his Counsel, Edmund L. Mooney and William E. C. Mayer, and says that the information filed and exhibited against him in this proceeding is insufficient in law.

WHEREFORE he demurs to the same and sets down and assigns against the sufficiency of said information separately and severally the following
246 enumerated grounds of demurrer, viz.:

1st. Because the information shows that the court is without jurisdiction.

2nd. Because the information shows that the court has no jurisdiction of the person of the respondent.

3rd. The information does not sufficiently inform the respondent what he is called upon to defend against.

4th. The information is insufficient in that it attempts by reference to other papers or writing to

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make a complaint or accusation against the respondent and does not embody in the information itself the recitals or parts of said other writings or papers relied upon, so as to show the respondent clearly what he is called upon to respond to.

5th. Because the information recites matters and things shown upon its face not to be within the personal knowledge of the United States Attorney, and does not aver that he charges or presents them upon information and belief.

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6th. Because the information contains averments of fact not within the personal knowledge of the United States Attorney and is not verified.

7th. Because the information is not verified.

8th. Because the information does not charge the respondent with any offense.

9th. Because the information on its face shows that the respondent is not therein charged with any misbehavior in the presence of the Court.

249

10th. Because the information shows on its face that the respondent is not charged with any misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

11th. Because the information does not show any contempt in the face of the Court or constructively in its presence.

12th. Because the information, when construed most strongly against the pleader, does not aver or

250 show that any publication was made by the respondent of or concerning the court.

13th. Because the information shows on its face that the letter set out therein was a privileged communication.

14th. Because the information shows that the letter therein set out and complained of was an official communication from one public official to another public official, written and dispatched of and con-
251 cerning public business.

15th. Because the information does not show that the letter therein set out and complained of was written with a view of influencing the court with respect to the decision of any matter or issue then pending before the court for decision or judicial determination.

16th. Because the averments of the information show on their face that the letter therein set out and complained of was not written for the purpose of obstructing the administration of justice.
252

17th. Because the averments of the information do not show any criticism of the Court with respect to a cogitation of the Court then in process of development.

18th. Because it does not sufficiently appear from the averments of the information that the publication of the letter set out and complained of was ever authorized by the respondent.

19th. Because it does not sufficiently appear from the averments of the information that the

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letter therein set out and complained of was ever authorized by the respondent to be published within the intent or view of obstructing the administration of justice.

20th. Because it does not sufficiently appear from the averments of the information that the letter therein copied and complained of was ever by this respondent authorized to be published with the view and intent of influencing the judicial determination or decision of the Court upon or with respect to any matter or issue then pending before 254
the court for judicial determination or decision.

21st. Because for aught that appears in the information the letter from the Respondent as Comptroller to Nixon as Commissioner was itself, as a matter of law, a public document which the respondent was powerless to suppress or withhold from publication.

22nd. Because the averments of the information are vague, uncertain and indefinite.

23rd. Because the averments of the information 255
are incomplete and unintelligible, except when assisted by other outside or collateral papers or writings, the parts of said outside papers so necessary to be referred to not being copied or set out in the information.

24th. Because the information is entirely insufficient in law.

25th. Because the averments of the information show nothing done, said, written or published by

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the respondent which calls in question or amounts in law to contempt of the authority of the Court.

26th. Because the information does not contain any sufficient or appropriate prayer.

27th. Because the information does not contain any sufficient or appropriate prayer for process.

28th. Because the information does not contain any sufficient or appropriate prayer for punish-

257 ment.

WHEREFORE, respondent prays for judgment of the Court upon the said information that the same be held insufficient, and that he be hence dismissed and not required to further answer or respond to the same.

EDMUND L. MOONEY.

WILLIAM E. C. MAYER,
Counsel for the Respondent.

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Order Overruling Demurrer. 259

At a Stated Term of the District Court of the United States for the Southern District of New York, held in the United States Courts, and Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 11th day of March, 1920.

Present—Hon. JULIUS M. MAYER, U. S. District Judge.

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UNITED STATES OF AMERICA

vs.

CHARLES L. CRAIG,
Defendant.

A demurrer having been interposed by the defendant to the information filed herein, and having duly come on to be heard, and after hearing Edmund L. Mooney, Esq., of counsel for the defendant, in support of the same, and Francis G. 261
Caffey, United States Attorney, in opposition thereto, an opinion thereon having been duly filed herein, it is

ORDERED that the said demurrer be, and the same hereby is, overruled; and it is further

ORDERED that the defendant plead to said information on Monday, March 15, 1920, at 10:30 o'clock in the forenoon of that day, in Room 331, at the United States Courts and Post Office Building, Borough of Manhattan, New York City.

JULIUS M. MAYER,
U. S. District Judge.

262 **Exhibit E to Petition for Writ—Plea of Not Guilty to Information for Contempt.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

CHARLES L. CRAIG,
Respondent.

263

Comes the respondent, Charles L. Craig, and for answer to the information filed and exhibited against him in the proceeding, by the United States Attorney for the Southern District of New York, and to each and every of the material allegations contained therein, answering says:

FIRST.—That he is not guilty of the matters and things therein alleged.

SECOND.—That the writing and publications mentioned and described in the information were and
264 are privileged.

THIRD.—That the respondent completely denies the contempt charged in the information filed and exhibited against him in this proceeding and claims his discharge as a matter of right.

CHARLES L. CRAIG,
Respondent.

WILLIAM P. BURR,
EDMUND L. MOONEY,
WM. E. C. MAYER,
Counsel for the Respondent.

Exhibits F and G to Petition for Writ are printed at pages 821 and 838. For Exhibit H to said Petition see page 840.

Testimony and Proceedings on Contempt Trial—Craig Exhibits 1 and 2. 265

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before—Hon. JULIUS M. MAYER, J.

UNITED STATES vs. CHARLES L. CRAIG.	Order to Show Cause. 266

New York, December 2nd, 1919.

APPEARANCES:

FRANCIS G. CAFFEY, Esq., United States Attorney, for the Government.

BEN A. MATHEWS, Esq., DAVID V. CAHILL, Esq., Assistant U. S. Attorneys, of Counsel.

WILLIAM P. BURR, Esq., Corporation Counsel of The City of New York, for the Respondent. 267

EDMUND L. MOONEY, Esq., Special Counsel with Corporation Counsel of The City of New York.

The Clerk of the Court: In the matter of the information against Charles L. Craig. Charles L. Craig to the bar.

(No response.)

Mr. Mooney: If your Honor please, Charles L. Craig, the Comptroller of The City of New York, and as such a member of its Board of Estimate and Apportionment, appears specially, but not generally, to object to the jurisdiction of his person, and

268 jurisdictionally to the sufficiency for validity, substance and subject matter of the order to show cause, dated November 20th, 1919, and information annexed thereto, and files this notice of appearance specially, which is dated New York, December 2nd, 1919, subscribed by William P. Burr, Corporation Counsel of The City of New York, attorney for the defendant, appearing specially, Municipal Building, Borough of Manhattan, City of New York, by Edmund L. Mooney, special counsel with the Corporation Counsel of the City of New
269 York, and upon filing this notice of appearance, which I do with the clerk, I suggest to your Honor that the proceeding stand over for one week.

Without dilating upon the contents of the special notice of appearance, I wish to say that a very grave question is presented, among others, as to whether the Court has jurisdiction of the person of an elected officer of the State of New York. That question is one that is covered by the special notice of appearance and will be discussed with the others when the time arrives.

We have felt that in view of the necessity which
270 the law prescribes, in our opinion of presenting such a point as this in the way that we are presenting it, that an appearance by the defendant, who objects that there is no jurisdiction of his person, might and probably would waive the jurisdiction point. For that reason Mr. Craig does not appear in person before your Honor to-day, but his non-appearance is for the reasons stated, and through no want of respect for the Court.

Mr. Caffey: If the Court please, the information was filed in this case on November 13th. On the 20th day of November, a week later, an order to

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show cause was made, returnable to-day. That order to show cause was duly served upon the defendant, on the 21st of November, 1919, as appears by the return of the Marshal, endorsed upon the order to show cause. In those circumstances, the defendant not having appeared here in person, and in accordance with the requirement of the order to show cause, I ask the Court now to issue a warrant of attachment for his arrest and production in person before this Court, to answer this information.

272 The Court: If I understand Mr. Mooney's statement correctly, the failure of Mr. Craig to appear, as stated by him, is not due to any lack of respect for the Court, but due to the fact that under the advice of counsel it may be deemed as matter of law a waiver, should Mr. Craig have appeared, and that his failure to appear is in order to technically hold the point which among other things is covered by the special appearance that was read by his counsel.

On the other hand, I fully appreciate the possibility of the jurisdictional question which is sought to be safeguarded by the motion of the 273 United States Attorney, and under the circumstances I will reserve decision upon both matters, setting the point on jurisdiction, which is said to be covered by this special notice of appearance, for argument at two o'clock on December 10th in this room.

Mr. Caffey: Upon my motion, if your Honor please, for the issuance of a warrant of attachment, what action will your Honor take?

The Court: I will reserve decision.

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Mr. Caffey: Reserve decision on that motion also.

The Court: Yes. And as I understand, if any argument is to be had, both sides will be ready on Wednesday the 10th at two o'clock, which will give counsel for both sides an opportunity to examine the points raised for presentation, if necessary, to the Court.

(Whereupon an adjournment was taken to Wednesday, December 10, 1919, at 2 P. M.)

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Before—Honorable JULIUS MAYER, U. S. D. J.

THE UNITED STATES

against

CHARLES L. CRAIG.

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Post Office Building,
N. Y., Dec. 10th, 1919, 2 P. M.

APPEARANCES.

Hon. FRANCIS G. CAFFEY, U. S. District Attorney (Ben A. Matthews, Esq., and Daniel V. Cahill, Esq., of Counsel), for the United States.

Hon. WILLIAM P. BURR, Corporation Counsel, EDMUND L. MOONEY, Esq. (W. E. C. MAYER, Esq., Assistant Corporation Counsel and Charles T. B. Rowe, Esq., of Counsel), Appearing Specially, for the Defendant.

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Mr. Mooney: If the Court please. We are here today in support of an objection raised by our special notice of appearance, and also, as I understand it, to meet a counter-application made by the District Attorney for an attachment against the person of Mr. Craig. While those questions are purely questions of law, it may not be out of place for me to restate here, and I cannot state it too often, that the absence of the Comptroller is due to no lack of respect on his part to the Court, but because having been advised by counsel in that behalf, he feels the questions which we are now 278
presenting could not be presented effectively were he to in the first place submit himself voluntarily to the jurisdiction of the Court. It is also proper to say here, with your Honor's permission, as preliminary to the discussion of these questions of law, that the Comptroller disavows now, as always, any possible intention that may be imputed to him of having been guilty of any contempt of court.

Mr. Mooney then argued in support of the motion and Mr. Caffey argued in opposition thereto.

The Court: Submit briefs on December 17th. 279

December 17, 1919. The briefs of the parties were submitted and the Court took the motion under advisement.

December 23, 1919. The Court overruled the defendant's objection and adjourned proceedings to December 29th.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

CHARLES L. CRAIG.

281

Before—Hon. JULIUS M. MAYER, J.

New York, December 29th, 1919, 2 P. M.

APPEARANCES:

Met pursuant to adjournment.

FRANCIS G. CAFFEY, Esq., United States Attorney, for the Government.

BEN A. MATTHEWS, Esq., Assistant U. S. Attorney, of Counsel.

282 WILLIAM P. BURR, Esq., Corporation Counsel of the City of New York, for respondent.

EDMUND L. MOONEY, Esq., Special Counsel with the Corporation Counsel of the City of New York.

Mr. Mooney: If your Honor please, there has been communicated to the respondent, Mr. Craig, your Honor's decision, and I assume that that is part of the record in this case without a formal order being entered to that effect.

The Court: Oh, yes; it is on file in the Clerk's office.

283

Mr. Mooney: And the respondent wishes an exception to be entered to that.

I am instructed to say that the Comptroller, in the preservation of what he deems to be his rights feels that there is no other way of proceeding, so far as he is concerned, than to point out to your Honor that he is willing to enter a general appearance, and that your Honor's order to show cause, the exact wording of which may have been overlooked, required the Comptroller to show cause why he should not be punished for contempt, and that it did not require his personal attendance in 284
this proceeding.

The order—and I take it that your Honor wishes no extended argument upon that proposition, other than for me to point out as distinctly as I can, that the order in this case differs wholly from the ordinary order in a contempt proceeding, which requires, according to the usual forms, that the respondent shall attend in person, and in such a case it may very well be imagined that a general appearance might not be sufficient. I wish to say that in this connection the Comptroller has been so engaged, and outside of his hurried luncheon, is 285
engaged to such an extent in the performance of his duties at this season of the year, which require his constant attention, that I have had an opportunity to confer with him, but that the conference has been under the necessities of the transaction of his business.

I am saying that to you only that you may know that the compulsion upon his time is very great, although that is not in itself urged at all upon the point of either appearance or jurisdiction.

May I repeat again, because it cannot too often be repeated, and I hope that it will be taken at its

286 fullest value, that it is through no want of respect for the Court that the Comptroller does not appear, but because, he instructs me to say, that he feels in doing so he would be waiving some of his substantial rights.

The Court: I do not quite get what you said in the beginning or early in your remarks to the Court. Do I understand if the Court were to amend the phraseology of the order, limiting it to a requirement on the Comptroller to appear, that he would then interpose a general appearance?

287 Mr. Mooney: We offer to do that now, your Honor, and I am instructed to appear for him generally, and I do so gladly, because we have taken our exception to your Honor's ruling.

The Court: I see.

Mr. Mooney: And it is with a view of facilitating this proceeding, instead of obstructing it, that I have been instructed to make the general appearance.

The Court: I understand then the Comptroller now does enter a general appearance?

Mr. Mooney: Does enter a general appearance.

288 The Court: You having saved your rights by the exception.

Mr. Mooney: Yes, sir. And I do wish at this time, if I may anticipate something that my learned friend, the District Attorney, may say on the other side, I do wish to point out that the authorities are uniform, so far as I am able to read them aright, that it is only in cases of flagrant misbehavior that the Court ever reaches out in advance by attachment. The learned District Attorney took the position a little while ago that he might be waiving some point or that there might not be

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a complete jurisdiction if the defendant were not personally brought into court. May I, with the greatest deference to his opinion in that respect, say that such is not my understanding of the authorities, and that it is not necessary in any case that the defendant be brought physically to the bar of the court, but only that he do show cause.

Now, may I say a word in addition to that, your Honor. In your opinion you have expressed yourself with so much moderation on the subject of the demurrer or plea, that this question of privilege may be asserted then, I thought that as this is a 290
question of law, we might be allowed to discuss that upon a general appearance with a due regard to the public exigencies which are not at all exaggerated by me, and that the case proceed in that way rather than in any other way. I feel that much good might be accomplished in that manner.

The Court: My suggestion is this: the general appearance that you have just entered seems to me to clear the situation very much, indeed. I do not know what view the United States Attorney may have as to the law involved, and if he has any suggestions after I shall have finished, I shall be glad 291
to hear them.

The Comptroller now having interposed a general appearance, the merits of the case, whether they may be of law or fact, as the argument may develop, are before the Court. The defendant having reserved and protected himself as against the ruling of the Court acquired an appearance. I fully realize that this week was a very busy week with the defendant, and I have no desire to inconvenience him at all in the performance of his public duties during this period. But I should like, and I think it is rather due to the Court, without going

292 into the technique at all, as a matter of respect to the Court, at some day that we may agree upon now, that he appear before the Court next week, and after thus showing what I think is the respect due from at least a lawyer to the Court, the Court has no desire to detain him physically from his duties; and upon that occasion, then, you and the District Attorney can argue any and all questions of law that you may be advised.

I tried to make it clear—I hope I have—that I have not yet decided to question of privilege as
293 affects that part of the information which you urge refers to an official act as distinguished from the unofficial. Now, it does seem to me that the defendant should appear in person in order to show that respect to the Court which I think is the just due of the Court.

Mr. Mooney: I appreciate very much what your Honor has said. Your Honor realizes, I am quite sure, that I am proceeding under instructions, as it is the duty of a lawyer to do in such a position as this, and that what I have said as to the public engagements of the Comptroller is merely said by
294 the way, and is said as an indication of the fact that he is thus engaged. The instructions which I have at the present time would not be broad enough to allow the statement or the inference that at a later date the Comptroller would feel that he could personally appear without waiving his points. Your Honor, of course, will realize that in my position as an advocate, and as a member of this bar, it is my wish and my desire that the matter shall proceed not only conformably to the practice, but with the highest regard for the respect which every man in the community owes to the Court. I

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do not want anyone to feel, however, that I can today go beyond the instructions which I have received and have announced. I feel that the proceeding could go on, based upon the general appearance.

Mr. Caffey: If the Court please, it is entirely agreeable to me, and it seems to me, considerate of the public interests, that a later date be set for the physical appearance of the defendant; but that in no circumstances should the case proceed without the physical appearance in court of the defendant.

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It is inconceivable to me, in a matter of contempt, that the defendant shall be heard by counsel without coming before the Court. Without arguing it at the moment, I adhere still to the view that the process set in motion by the order to show cause should be continued under consideration by the Court until there is an appearance physically here by the defendant, or the motion which your Honor now has under consideration, made by the Government, for the issuance of a body attachment is determined.

297

Now, to meet the convenience of the situation, I think your Honor's suggestion is not only an appropriate one, but a wise one, that a future date be set for the physical appearance of the defendant, and it is quite agreeable to me, if it meets with your Honor's approval, that you hold under advisement until that date the motion I have already made for a body attachment; but it does not seem to me conformable at all with the practice, with the requirements of the situation, or with the essential nature of a contempt proceeding, that it proceed until after there has been a physical appearance in court of the defendant.

298 Mr. Mooney: With respect to the latter, your Honor, without desiring at all to be contentious, I appreciate what the learned District Attorney has said, but there is no requirement for the personal appearance of the defendant in such a proceeding as this; and, in fact, all the English authorities where the question has come up as it has here, hold that the attachment does not issue until some contumacy following on the heels of the alleged contempt has been shown, and there counsel is always heard upon the rule to show cause. Nor
299 is that hearing accompanied, so far as the books disclose, by any physical appearance of the defendant. It is only where there is something contumacious. Now, in this case, without branching off at all into its higher reaches, is it not a matter of substantial interest to all concerned that the very important question of the underlying privilege be determined upon a motion to quash and upon a demurrer before we get to any other question? In no sense does a contempt proceeding depend upon the physical appearance of the defendant.

300 The Court: Well, I have never heard of a contempt proceeding where the defendant has not appeared; I have no familiarity with any such proceeding. The method, which is well settled, is to issue an attachment of the body. Now, in this district, as I pointed out, and as is familiar to you, that method is avoided wherever possible; and the United States Attorney, in conformity with an agreeable practice, either notifies the person concerned or applies to the Court for an order to show cause. Now in this instance the Court issued an order to show cause. It may be it was in the same

form as the Court issued another order to show cause concerning contempt; whether the exact language is open to debate or not is another question. The Court had no thought, in the nature of the language, which I think, but I am not sure, was taken from some reported case—the Court had no thought of using any than what might be called routine language. But the Court could have issued this attachment. Now instead of that the Court proceeded with, one might say, the pleasanter method, and the defendant failed to appear in order to make his point as to jurisdiction; and, as stated in the Court's memorandum, that failure to appear was received by the Court in good faith, the Court having no reason to doubt the correctness of the statement made by counsel in that regard.

Now, the Court has overruled that, and the Court does not desire upon this point any question of jurisdiction to arise hereafter. The Court is satisfied that in accordance with settled practice the defendant must appear. Now he may appear without any further process or the Court must issue its process.

Now, as you are evidently not in a position to decide that point, in view of the fact that you come here apparently to interpose a general appearance, without being clear as to the authority of your client, the disposition I shall make is this: I will set this case down for hearing on Wednesday, the 7th of January, in order to not interfere in any manner with the duties of the defendant during the closing days of the year. At that hour and time I will issue a body attachment forthwith unless at that time the defendant appears in this court room, pursuant to the Court's suggestion.

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Mr. Caffey: Your Honor did not include in your statement an hour upon that date.

The Court: At two o'clock in the afternoon in this room. Now I do not want to be called on to issue the attachment. I do not see that it is necessary at all; I do not see that anybody gains by that procedure. But it is the position into which the defendant forces the Court in order that the Court may be certain there is no question of jurisdiction, because the point may be raised hereafter, and not by yourselves, but by some other
305 counsel, that this general appearance has not brought the defendant into the jurisdiction of the Court. I do not want that point outstanding, because whatever decision there is, I want to have it on the law of the case or the facts, if there should be occasion to reach the facts; on the real merits of the case. If the information laid before the Court is one which is open to disposition by virtue of questions of law, interesting questions which you have raised, the Court of course will give those questions its very careful consideration; if it is open to, judging from your remarks the
306 other day, some explanations as to the facts, if we should get to the facts, very well; the Court will be glad to hear any explanation. But I do not see that the defendant is losing any technical point of any kind or description by appearing. I prefer to leave it in the same position in which I placed it at the beginning of what I said today: to put it in the shape of preferring that the defendant appear, in view of the fact that he has filed through you a general appearance. However, if he has another point of view, then the Court must proceed along what it deems may be necessary jurisdictional lines.

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Mr. Mooney: May I say, as to the point of the appearance, your Honor, that we are prepared to file with the Court a motion to quash, and if that be overruled, a demurrer, so that there would be no question but what the respondent had made a general appearance and submitted himself, subject to his exception, to the jurisdiction of the Court; and further might I say, as suggested by my associate here, that while this Court is not at all controlled by the practice which exists in the State courts in this community, that it is not, I believe, within the experience of any man that a 308
proceeding by or for punishment for contempt has ever been initiated otherwise nor responded to otherwise than by the presentation and filing of papers, and I have not found in this United States jurisdiction, a single case where the Court has proceeded in the first instance by attachment. I call to your Honor's mind a decision of Judge Rogers in the Weekes case, with which my learned friend I know is familiar because we have discussed it, in which he lays down the rule definitely that a general appearance by the defendant waives certain defects and so forth and so forth, indicat- 309
ing that in that case the general appearance was all that was necessary to confer jurisdiction.

The Court: That was in regard to papers that were seized.

Mr. Mooney: I realize that there is no case so far, at least, that I have been able to discover, that is directly in point in this instance, but this is the thought that I wish, if your Honor's mind is not fully made up on the subject, to submit for your consideration: I feel that in view of the fact that the alleged contempt here grows out of what

310 the defendant wrongfully or otherwise conceives to be the performance of a public duty, it is not the Court's intention to proceed with peculiar hardship.

The Court: Of course that has been demonstrated, because the Court issued an order to show cause at the very beginning.

Mr. Mooney: That is what I had in mind. Now if your Honor's intention is not to proceed with the case as one of peculiar hardship, why would it not be sufficient to proceed upon the general ap-
311 pearance such as is done in a multitude of cases. I doubt whether your Honor has in more than one instance in your experience, and I am fairly familiar with what goes on in these courts—I doubt whether in more than one instance you have had the physical presence before the Court of the person charged with the contempt. It is the universal custom in this community, as I understand it, and so far as my observation goes, outside of the printed books, that a person responds and shows cause by counsel.

The Court: I do not think that that is correct,
312 excepting in regard to a proceeding which arises out of the disobedience of an order. Very often those proceedings are the result of error or difference of opinion in the course of a judicial proceeding. Very often in those cases it is merely, as it were, a battle between the lawyers. But in this case the defendant is charged with violating a provision of the judicial code, which goes upon the theory that in law the contempt was committed in the presence of the Court. If the contempt was committed, in point of fact, in the presence of the Court, physically speaking, the Court would at once insist that the defendant in person be brought

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to the bar of the Court; but in this case, as in the Toledo case, the charge against the defendant is the commission of a contempt of the Court in the presence of the Court, as a matter of law, but physically outside of the court house or the Court environments; but the principle is the same. It is not, to repeat myself, that the contempt arises because a person disobeys an injunction order, perhaps not understanding the order, or placing a different construction upon the order from what the charge against him consists; but it is the class which is covered by the specific section to which I 314
have referred, which has been referred to as the Act of 1831; and I am quite sure that it requires the appearance of the defendant against whom the information is laid. Now, he may at the moment he appears, reiterate through counsel all of the safeguarding points that counsel has already stated. It is not the Court's purpose to in any way make of any less value, if it has any value, the point of special appearance as distinguished from general appearance. But this whole proceeding, I assume, is laid before the Court by the United States Attorney solely from the standpoint of the 315
dignity of the Court, speaking as personally as the Court can speak, and by that same token thinks it its duty to require the personal appearance of the defendant; and on that the Court firmly insists; and the Court is strongly convinced that that is its duty to the administration of justice and to the Court itself. And therefore, to repeat myself, recognizing that the defendant, as stated by counsel, is doubtless very busy with the official matters that come upon the closing days of the year, and recognizing also that perhaps counsel has not had the fullest opportunity to confer with the defend

316 ant upon this or other points, the Court has named a definite date, namely, the 7th of January, at two o'clock in this room, and the defendant and his counsel must then determine whether he shall appear as directed by the Court, or requested by the Court—I am not particular which way it is put—or whether he shall not appear. I should prefer to leave it in the position of an indication to the defendant what the Court thinks, especially as he is a member of the bar, and he at least owes it the duty and respect to appear, while at the same
317 time reasserting his rights that his appearance is not to be understood as in any way waiving any rights. Further than that I do not think I can go into circumstances.

Mr. Mooney: May I then, for the purpose of preserving a point on the record—may we except to that ruling because there are certain elements in your Honor's very considerate remarks that might seem to appiy to the question of personal convenience; and as I have said before—

The Court: Oh, no; I will relieve you of any embarrassment there. I do not take your question of
318 personal convenience as asking the Court for an adjournment or anything of that sort; I do not intend that auy rights the defendant shall have shall be jeopardized by any incidental statement which may be misconstrued. I understand that your reference to personal convenience, so far as this week is concerned, is quite irrelevant to the record, and does not in any way indicate that you accede to the Court's view of the law, and the Court has received such statements from you as counsel very properly advising the Court of the engagements of the defendant, who, in addition to being an individual person, is also a public official who is at the

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moment, as the Court of course knows, very busily concerned with the affairs of his office, as is usually the case in the closing days of the fiscal year.

Mr. Mooney: May we proffer for the record—I realize that it will go no further than that in view of your Honor's ruling—the motion to quash and the demurrer.

The Court: Yes, that may be proffered, and the Court will say that it will hear that motion and entertain the demurrer and argument upon both that motion and demurrer when and if the defendant shall have first personally appeared.

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Mr. Mooney: And to that latter part we except. Will you put a mark on them to identify them, Mr. Clerk?

The Clerk: I will take these upstairs and file them.

Mr. Mooney: I do not know that the Court will want them filed. He may only wish a mark on them to identify them. He may not think it proper to have them filed.

The Court: I do not care. They may be filed.

Mr. Mooney: I will see that your Honor's rulings are conveyed to the Comptroller.

321

The Court: I may say, in the meantime, that if I look over these documents—

Mr. Mooney: Yes, but please don't make up your mind until you have heard counsel.

The Court: Well, then, I won't look at them. Then the clerk will note an adjournment until January 7th in this room at two o'clock P. M.

(Whereupon an adjournment was taken to Wednesday, January 7th, 1920, at 2 o'clock P. M.)

New York, January 7th, 1920.

Adjourned to January 17th, 1920.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

vs.

CHARLES L. CRAIG.

323

Before—Hon. JULIUS M. MAYER, J.

New York, January 17, 1920.

Met pursuant to adjournment.

APPEARANCES:

FRANCIS G. CAFFEY, Esq., United States Attorney for the Government (Ben A. Matthews, Esq., and David V. Cahill, Esq., Assistant U. S. Attorneys, of Counsel).

324 WILLIAM P. BURR, Esq., Corporation Counsel of The City of New York, for the Respondent (Mr. Mayer, Assistant Corporation Counsel), and

EDMUND L. MOONEY, Esq., Special Counsel with the Corporation Counsel of The City of New York.

CHARLES L. CRAIG, Esq. (in person).

Mr. Mooney: If the Court please. Referring to the record at page 76, a transcript of which I have in my hand, your Honor ruled as follows:

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"At that hour and time (meaning the hour and time to which the proceeding was adjourned, and from which it has been adjourned to the present day) I will issue a body attachment forthwith unless at that time the defendant appears in this courtroom, pursuant to the Court's suggestion."

In view of that ruling the defendant being powerless to resist the process of the Court, reserving his objection and his exception, has appeared in person this morning, and now is present 326
in court. Will it be proper at this stage to take up the discussion of the motion to quash?

The Court: The Court will call upon the defendant to plead, at which point you may interpose a demurrer or whatever it is, and then the plea of the defendant will be deferred until those matters are disposed of.

The Clerk: Charles L. Craig, you stand charged with contempt of court and violation of Section 268 of the Judicial Code. How do you plead, guilty or not guilty?

Mr. Mooney: Before pleading, we wish to be 327
heard upon the motion to quash, which we have filed.

The Court: That is entirely proper.

Mr. Cahill: If the Court please, in a matter of this kind, it is usual to have bail fixed upon the arraignment, and we now rise upon that point and suggest that the defendant be released upon his own recognizance or in the custody of his own counsel.

The Court: He is released on his own recognizance. No bail at all will be required.

328 Mr. Mooney: I hope that your Honor's observation before I had an opportunity to rise upon my feet is not a definite ruling, because I have something to say upon the subject. May I consider that the question is open?

The Court: Certainly.

Mr. Mooney: I quite realize that the Court spoke in answer to the request of the learned District Attorney, which seems to be the spirit of courtesy. We are not here in an attitude of asking for courtesy. While we appreciate it, we do not ask it, and
329 I want to say that the learned District Attorney,—I want to say it in a most definite way,—is entirely outside of any procedure that is known to this Court in pursuit of a contempt proceeding.

The Court: I do not think we need be concerned about it. I can entirely disregard the point to which the District Attorney referred. The defendant has appeared; you have reserved your special appearance so far as it is possible for you to reserve your special appearance, and we will consider the question of recognizance practically wiped from the record.

330 Mr. Mooney: If that is so, I need not be contentious about it. This is a contempt proceeding in sui generis, and is in the nature of a criminal proceeding, but if the attorney has any idea that the Comptroller of the City of New York is to be subject to such law that he has handed down, and is handed out to felons, he is very much mistaken.

The Court: I don't think there is any occasion to do more than to say that the defendant has appeared. You have interposed your motion, and you will have an opportunity to be heard upon the motion to quash. As far as this Court is concerned, the defendant has now complied with

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the Court's direction, and it is for him to determine for himself, as far as I am concerned, whether he shall be present hereafter until such time as I ask him to be present. He may govern his actions so far as the Court is concerned, as pleases himself in the necessary performance of his public duties or his private affairs. I have no desire for his presence until such time as I shall require his presence.

Mr. Mooney: Now, Mr. Clerk, will you kindly hand me for convenience, the motion before the Court? (Clerk hands papers to Mr. Mooney.) 332

Mr. Mooney: If you Honor please, we move to quash and dismiss the proceeding on the ground that the Court has no jurisdiction over the respondent to proceed herein, and on the ground that the information on its face shows that he should not be further held to plead or answer thereto, and for separate and several grounds of this motion and for special causes why the quashal and dismissal prayed for should be allowed and entered, he sets down and assigns separately and severally the following, which counsel now proceeds to present to the Court for consideration in each and every 333 respect:

1st. The Court is without jurisdiction.

2nd. The Court has no jurisdiction of the person of the respondent.

3rd. The information does not sufficiently inform the respondent what he is called upon to defend against.

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4th. The information is insufficient in that it attempts by reference to other papers or writings to make a complaint or accusation against the respondent and does not embody in the information itself the recitals or parts of said other writings or papers relied upon, so as to show the respondent clearly what he is called upon to respond to.

5th. Because the information recites matters and things shown upon its face not to be within the personal knowledge of the United State At-
335 torney, and does not aver that he charges or presents them upon information and belief.

6th. Because the information contains averments of fact not within the personal knowledge of the United States Attorney and is not verified.

7th. Because the information is not verified.

8th. Because the information does not charge the respondent with any offense.

336 9th. Because the information on its face shows that the respondent is not therein charged with any misbehavior in the presence of the Court.

10th. Because the information shows on its face that the respondent is not charged with any misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

11th. Because the information does not show any contempt in the face of the Court or constructively in its presence.

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12th. Because the information, when construed most strongly against the pleader, does not aver or show that any publication was made by the respondent of or concerning the Court; and in this connection, counsel urges that there is no averment or allegation in the information that the publication alleged therein to have been made was either wilfully, knowingly, unlawfully or contemptuously made, as is alleged in the same information with respect to the writing thereof.

13th. Because the information shows on its face 338
that the letter set out therein was a privileged communication.

14th. Because the information shows that the letter therein set out and complained of was an official communication from one public official to another public official, written and dispatched of and concerning public business.

15th. Because the information does not show that the letter therein set out and complained of was written with a view of influencing the Court 339
with respect to the decision of any matter or issue then pending before the Court for decision or judicial determination.

16th. Because the averments of the information show on their face that the letter therein set out and complained of was not written for the purpose of obstructing the administration of justice.

17th. Because the averments of the information do not show any criticism of the Court with re

340 spect to a cogitation of the Court then in process of development.

18th. Because it does not sufficiently appear from the averments of the information that the publication of the letter set out and complained of was ever authorized by the respondent. At this point, namely, the 18th, it is well for me to urge again what I have already said with respect to the absence of any allegation that the publication was contemptuously, wilfully, knowingly or unlawfully
341 made as alleged.

19th. Because it does not sufficiently appear from the averments of the information that the letter therein set out and complained of was ever authorized by the respondent to be published with the intent of view of obstructing the administration of justice.

20th. Because it does not sufficiently appear from the averments of the information that the letter therein copied and complained of was ever by
342 this respondent authorized to be published with the view and intent of influencing the judicial determination or decision of the Court upon or with respect to any matter or issue then pending before the Court for judicial determination or decision.

21st. Because for aught that appears in the information the letter from the respondent as Comptroller to Nixon as Commissioner was itself, as a matter of law, a public document which the respondent was powerless to suppress or withhold from publication.

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22nd. Because the averments of the information are vague, uncertain and indefinite.

23rd. Because the averments of the information are incomplete and unintelligible, except when assisted by other outside or collateral papers or writings, the parts of said outside papers so necessary to be referred to not being copied or set out in the information.

24th. Because the information is entirely insufficient in law.

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25th. Because the averments of the information show nothing done, said, written or published by the respondent, which calls in question or amounts in law to contempt of the authority of the Court.

26th. Because the information does not contain any sufficient or appropriate prayer.

27th. Because the information does not contain any sufficient or appropriate prayer for process.

28th. Because the information does not contain any sufficient or appropriate prayer for punishment.

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Now, the grounds that we have presented to your Honor in support of our motion, are in the view of myself and my associates, presented in such succinct and definite way that elaboration thereof by oral argument would probably not assist the Court. In other words, there is no use of piling words upon words, and under the circumstances unless some indication is made to the con

346 trary, we will confine our argument to what has already been said in support of that motion.

Mr. Cahill: If the Court please, the motion to quash and the demurrer contain precisely the same grounds, and I assume we may argue them together.

The Court: Has the demurrer been filed also?

Mr. Cahill: Yes, your Honor.

Mr. Mooney: Just let us put it this way. The demurrer was proffered, but it has not yet been made a part of the procedure. I wish to be quite
347 technically correct, and therefore I am proceeding this morning to present and argue my motion to quash. When that has been done, if the proceedings are not quashed, I shall then ask to interpose the demurrer in regular and orderly form.

You see, the reason that my learned friend has knowledge of my demurrer is that in the other proceeding where it had reached the state where the Court was considering the question of the non-attendance of the Comptroller, it was deemed wise and proper to proffer the papers in his absence to indicate to the Court that there was something for
348 consideration, but they have not been presented in such form as to make them part of the record, except when I bring on my motion to quash, and if your Honor passes unfavorably upon that, then, and then only, will the demurrer be made a part of the record and we will proceed.

So far as I am able, I wish to guard the interests of the defendant or respondent, and while I am not entirely familiar with criminal procedure, I wish to do so at every stage, and if I fail to do so, it will be through lack of knowledge or experience rather than with any thought or idea of waiving, in the slightest particular, any of his rights.

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Mr. Cahill then argued in opposition to the motion to quash, and Mr. Matthews made the closing argument in opposition thereto.

The Court: Have you anything to say Mr. Mooney?

Mr. Mooney: I have nothing to say, your Honor, unless there be some point upon which your Honor wishes the matter to be further elucidated.

The Court: Now, the demurrer, if it were to be interposed, would bring up many of these questions upon the motion to quash, wouldn't it?

Mr. Matthews: All of them; the grounds of the 350
demurrer are, word for word, in the motion to quash. I am right in that, am I not, Mr. Mooney? The only difference is in the phraseology and the preamble in the grounds, the one setting forth language making it a motion to quash, and the other language making it a demurrer.

Mr. Mooney: We don't want to be confused about that, because while the sub-stratum is identical, a motion to quash, according to the cases, goes to the manner and form, whereas the demurrer will go to matters of substance. If I catch what is running through your Honor's mind, per- 351
haps you have in mind the withholding of your decision and the reserving of your decision on the motion to quash while you hear the demurrer; is that what I glean from your question?

The Court: Well, either that, or I shall dispose of the motion to quash and then take the demurer under advisement, because I think the demurrer raises the substantial questions in the case, whereas the motion to quash you said, I think, somewhat aptly, is directed not only to what would be contained in the demurrer, but rather to questions of form, such as whether the information should

352 be sworn to and so on. My theory of the thing was to deny the motion to quash, and then take the demurrer under advisement, because there are some questions raised in the demurrer which I think need careful study. I desired to make it clear in my previous memorandum that I did not pass at all upon the questions that were denominated by Mr. Mooney as questions of political privilege, which in a sense, I think is raised for the first time in a contempt proceeding, applying to a situation of this particular character. That question
353 will not only affect this case, but perhaps as being concerned from the standpoint of the question of law,—whatever becomes of it, is a question that is worthy of careful study and consideration, and there may be some other questions, but I think the dominant question, as I understand it, which is unrelated in a sense to what construction would be put upon the letter which the defendant is charged with having sent, is the question in the demurrer, which I assume for the purpose of the argument, and only for the purpose of the argument, the construction placed on the letter by the United States
354 Attorney. You then say that the defendant was privileged in that regard so far as the communication by him to another public officer is concerned. So, I will deny the motion to quash and if Mr. Mooney now interposes the demurrer, I will take the demurrer under advisement, and either—

Mr. Mooney: We wish to be heard on the demurrer, your Honor.

The Court: You mean you wish to be orally heard?

Mr. Mooney: Without any intent to interrupt your Honor, we wish to except to the overruling of

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the motion to quash, and we wish to be heard orally on the demurrer, and we are ready to argue that, if your Honor will allow us to do so. I certainly would be willing to go on now.

The Court: I would be glad to hear you both orally because I would like to hear that carefully and I would rather hear it on another date on account of some official matters this morning, and I can make the date whatever would be convenient to the United States Attorney and yourself.

Mr. Mooney: If we might have next Saturday morning, then we would be sure of not having any 356
trial engagements interfere with it.

Mr. Caffey: That is agreeable.

The Court: Is that agreeable to you Mr. Matthews?

Mr. Matthews: Yes.

The Court: That's very good. Suppose we have the argument on the demurrer at 10:30 and have it, if you will, at the court room adjoining my chambers in the Woolworth Building. It will be a little more comfortable, and I will endeavor to arrange no other engagements so I can give both sides all the time necessary, because I am quite 357
frank to say that I want to go into some of the points raised with considerable care, and we will adjourn until a week from today at 10:30, and hear it in the Court room adjoining my chambers.

(Whereupon an adjournment was taken to Saturday, January 24th, 1920, at 10:30 A. M. In the Woolworth Building.)

New York, January 24th, 1920.

Adjourned to January 31st, 1920.

358

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before—Hon. JULIUS M. MAYER, J.

UNITED STATES OF AMERICA

vs.

CHARLES L. CRAIG.

359

In Chambers,
Woolworth Building, N. Y. City.
January 31st, 1920, 10:30 A. M.

APPEARANCES:

COL. CAFFEY (Mr. Matthews, Asst. District Attorney), for U. S.

HON. WILLIAM P. BURR, Corporation Counsel (Mr. Mayer, Asst. Corporation Counsel).

EDMUND L. MOONEY, Esq., Special Counsel (Mr. Cruikshank, of counsel), for the defendant.

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ARGUMENT ON THE DEMURRER.

Mr. Mooney: Upon this demurrer, the primary point for discussion is, and would ordinarily be, that of privilege, but inasmuch as the subject of privilege has been discussed at length in one of its aspects upon the motion with regard to a special appearance, it has seemed prudent to us to present in the following order, the arguments for consideration this morning:

FIRST.—That there is no contempt in substance, which we will proceed to demonstrate by dissecting

the communication, or alleged contemptuous writing. 361

SECOND.—That there is no contempt, because the subject matter of the criticism was not then pending *sub judici.*

THIRD.—That there was no misbehavior within the meaning of the statute. This subject, I may say, in passing, is closely related to that of privilege.

FOURTH.—The subject of privilege with respect to the subject matter; and

FIFTH.—That there was no contemptuous publi- 362
cation.

Now, up to the present time there has been no oral consideration or discussion of the communication which is set forth in the information, and upon which the alleged contempt is based, and it has been assumed in orderly procedure, for the sake of discussion, that that matter might be passed. I have felt from the beginning, and feel stronger every day that it might have been better if the orderly procedure had allowed it, that this communication might be considered and weighed and dissected at the earliest opportunity, because 363
both my associates and myself have been impressed from the start that only by a misconception of this writing could there be the slightest thought of contempt.

I shall proceed to review it from the standpoint of demonstrating that it does not contain any contemptuous reference to the Court, and that it is only by a hurried, a cursory reading of the communication that it may be said to contain anything which could be offensive beyond the lines of just criticism.

The Court: Exchange briefs by February 9th and submit briefs on February 14th.

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New York, February 14, 1920.

Briefs submitted and decision reserved.

New York, March 9, 1920.

The Court overruled the demurrer and fixed March 15, 1920, as the time to plead to the information (see 266 Federal Reports, 230). Defendant excepted.

New York, March 15, 1920.

365 Defendant filed a plea of not guilty and the Court adjourned the proceedings to March 17th.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

CHARLES L. CRAIG.

366

Before—Hon. JULIUS M. MAYER, Judge.

New York City, March 17, 1920;
2 P. M.

APPEARANCES:

Hon. WILLIAM P. BURR, Corporation Counsel of The City of New York, by Edmund L. Mooney, Esq., Special Counsel, for the Defendant.

B. A. MATTHEWS, Esq., Assistant United States Attorney, for the Complainant.

The Court: I will take up the motion for a bill of particulars in The United States against Craig. I believe the District Attorney was to let counsel

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and the Court know what disposition he had toward the matter.

Mr. Matthews: If the Court please, this matter comes up again to-day on a motion notice of which the United States Attorney received last Saturday, on March 13th, 1920. The notice of motion indicates that a bill of particulars of the following items referred to in the information in the following language will be moved for. I now quote from the Information; and I read from the notice of motion: "The hearings, notices, petitions, orders, minutes, papers and dockets in each of said suits 368
and in said proceeding, all of which are on file in this Court are by reference hereto"—I think that should be "thereto"—No, "are by reference hereto annexed and made part hereof." Then the motion specifies, in Items A to G inclusive, the parts that are required or requested. The United States Attorney interposes no objection to an order directing that these particulars be furnished; and we will prepare a bill giving the particulars requested as soon as it can be gotten up. How long that will take I am unable to say until I have gotten a little further along with the work of preparing it. I 369
should like, however, to reserve the right to furnish supplemental or additional bills of particulars after I shall have served the first one. I expect to make it include everything; but the record is very voluminous, and I would like to have the Government's rights safeguarded by this suggestion which I am now making. I think we can have the bill of particulars completed by one week from to-day.

Mr. Mooney: I assume that the reservation which counsel suggests, and which is really quite proper in every litigation, should be adopted here, with the proviso, however, that he will apply to

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Your Honor for leave to serve any additional bill of particulars that he deems that he should. Of course I would not want to feel that he could serve those at random.

The Court: Yes, there will be no trouble about that. To-day is the 17th. How many days after the bill, Mr. Mooney, would you want before the trial?

Mr. Mooney: Well, I should like to be able to express myself on that point, your Honor; but the division of labor in connection with the preparation
371 here has been such that I have not been able to apply myself to the particular branch of the case which the making of this bill will open up. That is to say, my associates have drawn certain conclusions and have informed me with respect to their conclusions, as to what they deem a mass of material which will be sifted out now by this bill; and I have thought, under those circumstances that the most useful way that I can apply myself to the matter would be to wait until I saw the bill. Now that does not mean by any means that I shall not be going ahead; but I would be wading through
372 a great mass of material in anticipation of that part of the case. Would your Honor deem it wise and prudent to leave open that question until we have seen the bill?

The Court: Suppose I do this: Suppose I give Mr. Matthews—this is the 17th. I know he is very much crowded, as crowded as you are. Let him serve the bill on the 26th of March, which is Friday; and you want to prepare an order with a reservation of leave to apply to the Court to furnish it further?

Mr. Matthews: Yes.

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The Court: And it will be the understanding that the trial will occur at least ten days after the service of the last bill of particulars; and in order to keep the matter in regular form, I will set April 13th at 2 o'clock in the afternoon for the commencement of the trial.

Mr. Mooney: Yes.

The Court: With the understanding that if by Friday the 9th of April, which is the preceding Friday, upon arrangement between counsel for the Government and counsel for the defendant, application is made, I will fix a date further along, 374
should either of you be professionally so circumstanced or by reason of some unexpected personal matters, to a date which will be convenient.

Mr. Mooney: May I make this suggestion, which I think will faciliate the trial very much and probably shorten it very considerably, that after the Government has put in its case an adjournment be taken of such length, either brief or otherwise as your Honor deems best according to the requirements of your Honor's calendar and engagements, before the putting in of the defendant's case. That is to say, I believe that in the close of the Govern- 375
ment's case if, as now appears, it will necessary for the defendant to put in his proofs, because your Honor has ruled upon many if not all of the points of law which tend to indicate that the defendant will be required to put in his case upon the facts,—having that in view, a short adjournment between the closing of the Government's case, if that is agreeable to my learned adversary and to the Court, would, I am quite sure, facilitate the presentation of the whole matter.

The Court: That meets my disposition to so do; but I don't care to rule on that now. I will say

376 that there will be no trouble about the amendatories. There is just one practical point which has occurred to me; I do not know whether it has been thought of by Mr. Matthews or yourself. I think it would save a considerable amount of unnecessary physical labor if the Government could refer to the printed volumes in so far as those printed volumes contain any of the papers on which the Government may rely. Have you a copy of the volume?

Mr. Mooney: No.

377 The Court: I mean the printed volume of the receivership.

Mr. Mooney: No.

Mr. Matthews: They are all, I think, in the possession of the Corporation Counsel. I had expected, in preparing my bill of particulars, to make reference to the documents which have been printed and thereby save copying them bodily into the bill of particulars. I will see to it that a copy of the printed record to which reference is made is at the disposal of the attorneys for the defendant.

Mr. Mooney: I should, as a matter of mechanics,
378 be very glad if the learned District Attorney would furnish me personally with a copy of the record so that I may work at it in my own library. There will be no difficulty about that. I presume there are additional copies, and it is not convenient for me personally to go to the Corporation Counsel's office and to work upon the record there.

Mr. Matthews: I think there will be no difficulty whatever about that.

The Court: If you should be short a copy just let me know about it, and I will either see if there is a copy available or, if not, while I need it from time to time, I will be willing to lend my own copy to Mr. Mooney.

Mr. Mooney: Your Honor might not like perhaps the markings that I imagine I might make on the margin; although I am quite sure that there will be nothing there but what would lead to your favorable consideration, yet they may be of an intimate nature which may be such that you would not care to have them on your copy. 379

The Court: I will give you the Court's copy, but if it should be back some day it might be filed in the Court's personal archives as a most agreeable reminiscence.

Mr. Matthews: I may loan Mr. Mooney my copy.

The Court: There will be no trouble about that. Then for purpose of orderly procedure we will set the matter down for April 13th at two, to be changed, if at all, by an understanding on or before the 9th of April. 380

Mr. Matthews: So far as I can tell now I think the Government, unless due to personal engagements of myself and other Government business, will probably be ready to proceed on that day.

The Court: Very good.

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382

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

CHARLES L. CRAIG.

New York, April 12th, 1920.

383

Mr. Mooney: I have been communicated with by the Comptroller who tells me that tomorrow afternoon he is required by his official duties to be present on the hearing of a bill in Albany concerning himself and the other officers of the Administration and that he will be required to attend on a number of hearings in connection with legislative matters in which the City is interested, during the remainder of the legislative session which has been tentatively fixed to continue until the 24th inst. Under the circumstances I apply for such adjournment as appears reasonable to the Court.

384

Mr. Matthews: I am agreeable, in the circumstances, to any date the Court may set.

The Court: In view of the statement of counsel for the Comptroller in respect of the necessity of the Comptroller giving his time to legislative matters affecting the City, I shall grant an adjournment until April 27th at 2 P. M. If for any reason of a public character a further adjournment is desired, counsel will please let me know some time during the week ending April 24th.

New York, April 27th, 1920.

Trial adjourned to May 10th, 1920.

385

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before—Hon. JULIUS M. MAYER, U. S. D. J.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES L. CRAIG,
Defendant.

386

New York, N. Y., May 10, 1920.
Two o'clock P. M.

APPEARANCES:

For the Government: FRANCIS G. CAFFEY, Esq., United States Attorney; BEN A. MATTHEWS, Esq., Assistant United States Attorney.

For the Defendant: WILLIAM P. BURR, Esq., Attorney for Defendant; Edmund L. Mooney, Esq., Russell Tarbox, Esq., Charles T. B. Rowe, Esq., and Eli S. Wolbarst, Esq., of Counsel for Defendant.

387

Mr. Matthews: If your Honor please, I move the trial of the case of the United States against Charles L. Craig on the calendar to-day.

The Court: Very good.

Mr. Mooney: Enter the appearance of Mr. Tarbox in place of Mr. Mayer, one of the counsel for the defendant.

388

Mr. Matthews: I think it is unnecessary to make any extended opening statement. The Government has a number of witnesses available and will proceed with the introduction of its evidence.

The Court: Very good.

Mr. Matthews: Mr. Nixon.

LEWIS NIXON, a witness called on behalf of the Government, being duly sworn, testified as
389 follows:

Direct Examination by Mr. Matthews:

Q. You are Mr. Lewis Nixon, the Public Service Commissioner, for the First District? A. I am.

Q. Do you know Mr. Charles L. Craig? A. I do.

Q. Did you, on or about October 3rd, address to Mr. Craig a letter of which the carbon copy which I now hand you is your office copy?

Mr. Mooney: I object to the question with
390 reference to the carbon copy.

A. October 1st is the date.

Mr. Mooney: I object to that question as involving a conclusion. If you wish the original of any letter such as the one you have handed the witness, if you will let me know, why, he may be able to produce it, but we are dealing with a public officer here scarcely familiar with the routine of his office.

391

Q. Mr. Mooney has produced what appears to be a letter dated October 1, 1919, addressed to Hon. Charles L. Craig and signed Lewis Nixon. Was that letter sent by you? A. It was.

Q. Did you receive a reply to that letter? A. I did.

Q. Is this the reply that you received (handing paper to witness)? A. I think it is.

Mr. Matthews: I offer in evidence both the letter of Mr. Nixon and the reply of Charles L. Craig, which is dated October 6, 1919.

392

The Court: The clerk will mark them.

Papers marked Government's Exhibits 1 and 2.

Q. When did you receive the letters from Mr. Craig, dated October 6, 1919? A. During conference, on the forenoon of October 6th.

Q. Who was present at the time you received the letter? A. Two of my deputies, Mr. Glennon and Mr. Barrett; the Transit Construction Commissioner; Police Deputy; his attorney, my counsel and a number of the junior counsel and representatives of the various traction companies of the City.

393

Q. Was that gathering the conference which was referred to and called by your letter of October 1st, Government's Exhibit No. 1? A. It was.

Q. Was the letter from Mr. Craig read at that gathering? A. It was.

Q. Can you state whether or not the press was represented at the time that letter was read? A. Some time before that I asked the press to withdraw and all those who did not represent the com

394 panies, and I presume they did. Some time before the letter was received I had asked the press and those who were not representatives of companies to withdraw, which they did.

Q. Where was this gathering held, where was the meeting held? A. In the hearing room of the Public Service Commission, on the top floor of 49 Lafayette Street.

Q. Is that in the City and County of New York? A. It is.

Q. And in this Judicial, the Southern District?

395 A. Yes.

Q. After the letter was read was it made public, or were copies of it given out to the newspapers by you? A. No.

Mr. Mooney: I object to that as a conclusion, or, if not a conclusion—

The Court: I will allow the question. "Was it given out by you to newspaper men, or to newspapers?"

Mr. Matthews: You may examine him.

396 Cross Examination by Mr. Mooney:

Q. Have you the envelope which contained this letter, Government's Exhibit No. 2, of October 6th, from the Comptroller to you? A. I have not.

Q. Do you know whether it has been preserved? A. I do not.

Q. Do you know whether it was delivered by hand? A. It was delivered to me during the conference by my secretary, Mr. Gleason.

Q. What is the name, please? A. Mr. Edwin S. Gleason, G l e a s o n.

397

Q. And you were sitting on a dais at that time? A. I was.

Q. And did he deliver it to you in an envelope? A. He did.

Q. And did you open the envelope? A. As near as I can remember, I opened it myself, yes.

Q. And when you opened the envelope did you read the letter to yourself, before reading it aloud, or did you read it immediately aloud? A. I glanced through it and then read it aloud.

Q. This hearing room that you have mentioned was the regular hearing room of the commission, 398
was it? A. It was.

Q. A public place? A. A public place.

Q. And a place where you performed your duties —that is, those parts of them that are performed in public are in that room, are they, done and performed in that room? A. Yes. Of course. I have hearings where there are only a few in my own room, occasionally. There was a very large number this time.

Q. This conference that had been called, to which you have made reference, was called by you as a public conference was not it; are you quite 399
sure about that? A. Well, the letter speaks for itself. My idea—

Q. No; excuse me, sir. I say, are you quite sure that it was not called as a public conference? A. It is a question of what you consider a public conference.

Q. Certainly, it was not called as a private conference, was it? A. Yes, intended so, and so stated by me when the point was made that there were a number of newspaper men; I said I did not intend to hold it—

400 Q. But you did not evince that disposition until you had read through 23 pages of stenographer's minutes, did you? A. I had not the slightest objection to its being public.

Q. Let us get the starting point right. When you called this conference you intended it to be a public conference, but you were perfectly willing to have it a closed conference if somebody desired to have it closed; is not that the situation? A. No, it was intended to be confined to the representatives of companies and parties of interest. I
401 wanted to get a round-the-table conference, and I said exactly what I wanted in the letter and the letter speaks for itself, and I wrote it as carefully as I could.

Q. Will you pardon me for saying that it does not appear on the face of the letter that it is to be either public or private? We have read the letter with care. Will you come back to my question, Mr. Nixon, and state whether you were holding this conference as a public conference when you started it as Commissioner? A. It was held as an open conference when I started, and the Traction Con-
402 struction Commissioner called attention to the fact that he thought it would be better if it were closed. I was quite willing to accede to his idea. My idea was to confine it to people who were interested in this matter. It was not a general, public conference, because it required a meeting of minds to readjust the situation.

Q. Well, you certainly did not call it as a private conference, did you? A. I should say so. You seem to be holding to that meaning, but from my point of view—

403

Mr. Mooney: I move to strike that out and that these matters be refrained from.

The Court: I think the Commissioner has answered the question.

Mr. Mooney: I except to Your Honor's ruling and I ask Your Honor particularly to strike out the suggestion of the witness with reference to "holding." It is not decent procedure.

The Court: Denied.

Mr. Mooney: I except.

404

Q. Now, is not it a fact that no reference whatever was made to its being a closed conference until a number of people had been heard and until you had had proceedings which, reduced to the stenographic form, represented about 23 pages of proceedings? A. 23 pages of the proceedings at about the time at which I asked the various people to withdraw. I had done most of the talking.

Q. And was the suggestion that it should be a closed conference made immediately preceding that statement of yours which appears on the 23rd page? A. Yes.

405

Q. Had you not, prior to the suggestion that it be a closed conference, read in public, in the presence of all of these people, a memorandum made by you, in which you stated that you intended to send and publish it in the press? A. Absolutely.

Q. Well, then, that certainly was public, was not it? A. My general ideas of the solution of the question of "public" was intended to be made so, yes.

Q. In other words, are we to understand that you thought, as Commissioner, that it was a proper proceeding to have your remarks public and the

406 rest of it private? A. I gave it no thought at all from that point of view.

Q. You did say, and it so appears in the minutes, did not you, that you had intended it to be a closed conference? A. Yes.

Q. What changed your mind? A. Nothing at all people came in there and there seemed to be no particular reason at all for putting them out, that was all.

Q. Do you claim that there is anything upon the face of these communications which indicated
407 to the Mayor of the City, the Comptroller and others, that this was to be a private conference? A. I do not think so. It was a matter of indifference to me whether it was private or closed. I expected in a way to make it closed. When I saw the representatives of the papers and others that were interested enough to come, from my point of view there was no objection made. I would not have asked them to go out had not the question been brought up by another man.

Q. With whom had you conferred prior to calling the conference? A. With my deputies and
408 with the Transit Construction Commissioner.

Q. Did you receive an intimation, directly or indirectly, from the Court, in support of the conference, or the holding of the conference? A. I do not remember that I did.

Q. Well, try and recall? A. Well, I do not remember.

Q. You had talked with Mr. Stimson, had you not? A. About this conference?

Q. Yes. A. Not until I had made up my mind to have it. I do not remember any discussion with him in connection with it at all. I was talking

409

with a lot of people about that time and there was no secret in my mind.

Q. Did you receive a communication from any one stating, in substance, that this conference would be agreeable to the Court? A. I do not think I did.

Q. You have no recollection of any? A. No.

Q. Had you written another and separate letter to the Comptroller on October 3, 1919, which was the subject of this conference? A. I think I had.

Q. Is this the letter (handing paper to witness)? A. Yes, I wrote that letter.

410

Mr. Mooney: I offer that letter in evidence.

Mr. Matthews: No objection.

Letter of October 3, 1919 marked Defendant's Exhibit A.

Mr. Matthews: I do not see how it is relevant or material to the main issue here, but I have no objection to it.

Q. Well, you intended this letter, which has just been received in evidence as Exhibit A, to relate to the conference about which you testified on your direct examination, didn't you, when you wrote the letter? A. Certainly; I was in hopes that the Comptroller would come.

411

Q. Well, I will read the letter (reading: "Public Service Commission for the First District, No. 49 Lafayette Street, New York, October 3, 1919. Office of Lewis Nixon, Commissioner. Hon. Charles L. Craig, Comptroller of the City of New York, Municipal Building, New York, N. Y. My dear Mr. Comptroller: I have been wishing for an opportunity to discuss matters with you, but owing to the intemperate attitude of the Mayor in con

412 nection with any act of mine I have not asked for a conference, as any talk with me might have excited violent dissatisfaction from certain quarters, and I dislike to be a source of discord, even if in an official family. Owing to certain facts that developed at the hearing of Wednesday, I was practically forced to call the conference to which you are invited Monday. We cannot hope to get the full measure of a concession in advance. There must be negotiations. I trust you will agree with me that this is City's business of so vital a nature
413 as to compel participation. The final word is with the City Government as to the sufficiency of concessions. While I am stated to act above the law, surely in this case I am simply trying to adjust a situation that should not continue and one in which it is the duty of all charged with public trusts to aid. With kind regards, I am, yours very truly, Lewis Nixon, Commissioner."

Side Note: "Assurances of participation from the larger holding companies and several of the smaller units have been received. I expect them all." Are not the words in the left hand corner, in
414 ink, commencing with the word "Assurances" and ending with the word "all," in your own handwriting? A. They are.

Q. And did you write them on there at or about the time that you signed the letter? A. I did, at the same time.

Q. And by "assurances of participation" did you mean that you had a promise of attendance? A. Yes.

Q. Did you mean anything more? A. No.

Q. Sure of that? A. How did I know what was going to be the result of the conference?

415

Q. I asked you, sir, whether you meant anything more? A. I told you I did not.

Q. I do not think you did, but if you think you did, why, I will pass to the next question. Did you have any assurances at all? A. A number of them.

Q. What of, attendance? A. Yes, from representatives of the various people to whom this letter, general letter, was addressed. This was not addressed simply to the members of the Board of Estimate but to a number of others, and I referred—

416

The Court: You mean not to the members of the Board of Estimate alone?

The Witness: I meant it for anyone, and that was with a view to making the letter answer for everybody who had the general interest to meet with me and discuss the matter.

Q. I did not ask you any such question, sir. I did not ask you what you were thinking or what you were doing. I asked you what I think was a very simple question. Did you have any assurances of participation other than the assurances of attendance? A. No.

417

Q. Do you observe here the words, "while I am stated to act above the law," that there are quotation marks—"above the law"—aren't the words "above the law" in apparently the same colored ink as your signature? A. Yes.

Q. Did you make those quotation marks yourself? A. I did.

Q. Who were you referring to when you wrote "While I am stated to act above the law"? A. Certainly the Mayor said so several times. I do

418 not know whether other members of the Board of Estimate & Apportionment had said it or not.

Q. Well, you had the Mayor principally in mind, did you? A. Anybody that stated that I was acting above the law. There seemed to be a general desire to charge me with that.

Q. It is a fact, sir, is it not, that during this conference itself you stated that you had no lawful power in the premises, didn't you? A. I don't know; I do not think I did. I have got all the records here. It will speak for itself. I will stand
419 for it, if I said it, but I would like to know the connection in which it was said.

Q. I will remind you, sir, when we reach that point, if your memory is not good upon the point. Didn't you state in substance during this conference that you had no power whatever, and that the only man present who had any power was Transit Construction Commissioner Delaney? Did you not make that statement in substance? A. I may have.

Q. Well, then, were you not acting above the law? A. No, it was my duty to bring about this confer-
420 ence and adjust this situation, if it were possible.

Q. Who had conferred that duty upon you? A. The Certificate of Appointment, in my judgment.

Q. You mean from the State of New York? A. Yes.

Q. Then I will ask you what you meant by the statement which you made in your own words, reading as follows: (Page 26) "I have no power; the power will vest in the Rapid Transit Construction Commissioner, who sits here, as I tried to make very clear, and as he himself even made more clear, as an individual." I ask you, in view of your previous answers, what you meant by saying "I

421

have no power"; did you mean to speak truly and properly? A. Just a minute; I want to read this. I think that that particular reference meant with respect to the old contracts. Of course, I have power as respects either the service roads and other matters that come up in conference.

Q. Well, then, in a certain respect you did have no power, as you yourself admitted; is that correct? A. Well, my statement to the effect that I had no power would not destroy the power if I really possessed it, I presume.

Q. We understand that, sir. I am getting at 422
your state of mind. A. Do you want my state of mind?

Q. Excuse me, sir; I am conducting this examination. A. You said you wished my state of mind.

Q. Well, I am getting at it quite to my satisfaction. A. That is pleasant.

Q. You have never been in sympathy with the Board of Estimate & Apportionment on this question relating to the matter of conferences, have you?

Mr. Matthews: I object. 423

The Court: Objection sustained as irrelevant and immaterial.

Mr. Mooney: I submit, your Honor, that I have a right to get at the witness' disposition and attitude, and also the question of bias.

The Court: No, I have ruled.

Mr. Mooney: I except.

Q. You have referred to a statement being in your hand as a record of the conference. A. This paper (indicating).

424

Q. Is that a proper and official record? A. It is.

Q. Made in the regular course of business by the Commission? A. Made by the proper stenographers who appeared before the Committee for that purpose.

Q. And the stenographers took down all that occurred? A. I assume they must have; that is their business.

Mr. Caffey: I object to the record going in evidence. It is immaterial. At the same

425 time, if Mr. Mooney desires that record to go in evidence, there will be no objection.

Mr. Mooney: I will take the concession as far as it goes. I am always glad to be helped over my difficulties. Having the concession, I will proceed with that as a basis for further questions.

Q. This is a printed book, is not it, that you have in your hand? A. It is, yes.

Q. And was this regarded as of sufficient importance to print it?

426

Mr. Caffey: I object to the question as immaterial.

The Court: Sustained.

Mr. Mooney: I except to that.

Q. Did you direct the printing of it?

Mr. Caffey: I object—immaterial.

The Court: I will allow it on the question of authenticity only.

Mr. Mooney: My reason for asking the question goes very much further than that,

427

your Honor. I shall object to any limitation.

The Court: I will limit it to that.

Mr. Mooney: In other words, this bears directly upon publication?

The Court: Yes.

Q. When was this published, if you know, Mr. Nixon? A. It was published after the 6th of October; I cannot tell you exactly when. Just as quickly as it could be after that time.

Q. It is published under a contract, is it, that the Public Service Commission has? A. I suppose so; I do not know how it is published. The Secretary of the Commission ought to publish it. 428

Q. You do know, do you not, that the General Shorthand Reporting Co., whose name is on the face of the document, conducted by Mr. Jay McNamara, is the official reporting staff of the Commission? A. Well, I do not see anything about that on mine.

Q. Does not it say "General Reporting Co," on the bottom of yours? A. No.

Q. Well, it is the General Shorthand Reporting Co. of 150 Nassau Street, isn't it, that publishes the document? A. Well, I am not absolutely sure; I think that is the name. It is published through the order of the Secretary of the Commission, based upon the stenographic notes *that* are taken at that conference. I can go that far; I am positive on that. 429

Q. And that was under a contract between Mr. Jay McNamara and the Commission, dated on or about May 31, 1917, isn't it?

Mr. Matthews: I object, unless the witness knows.

430 A. I know there was a contract with the stenographers, yes, but whether it covered printing I do not know.

Q. Well, anyway, this document that you have in front of you is one of the documents that is gotten out in the regular course of business by the Commission, is it? A. The printing is the most important business, in my opinion.

Q. Now, do two stenographers sit there at the hearings, instead of one, so that one relieves the other as the hearing goes on? A. I think they do.

431 Mr. Matthews: I object, as immaterial.

Q. And do you remember that on this day there were two stenographers present? A. No, I do not remember.

Q. Well, do you remember that the usual thing took place? A. If that is the usual thing, yes; but you cannot expect me to remember things that I do not remember.

Q. And is that for the purpose of speeding the public report of the proceedings, for the benefit of
432 the people? A. I assume it is in the direction of accuracy.

Q. Do you know that the contract between you and the reporters, or between your office and the reporters, provides that the Commission itself is interested in the avails or moneys realized from delivering transcripts and printed pamphlets? A. I was told that; yes.

Q. So that that is a part of the business of the Commission? A. It is.

Q. And there was no departure in that respect on this day, was there? A. None whatever. We fol-

433

lowed the usual procedure, whatever that was I don't know.

Q. Have you read over the pamphlet that is in your hands? A. I have.

Q. And how recently have you read it over? A. I read it this morning.

Q. Then I offer it in evidence. A. Are you going to take this?

Q. Well, unless you object. A. No.

The Court: Give the Commissioner another copy, if you have one. 434

Pamphlet marked Defendant's Exhibit B.

Q. Let me exchange with you and give you an entirely new copy. A. Thank you, sir.

Q. Do you happen to know that the call for this pamphlet was so great that it had to be reprinted? A. I do not think I do.

Q. Now, if you will open that. You expected a big call for the proceedings at that meeting, didn't you, as a matter of great public interest? A. A number of those that came there asked to have copies of what had been said. 435

Q. That even took place while the proceedings were going on? A. It did.

Q. So that it was quite apparent to you that that meeting was one of unusual interest, wasn't it? A. Well, naturally.

Q. From every standpoint? A. From every standpoint.

Q. That of the people; that of the railway companies; that of the public officers, and that of yourself—from all of those standpoints? A. It was general public business of intense interest to every one.

436 Q. Now, Mr. Nixon, I come back again to the point—did you have no intimation before the holding of that meeting as to the attitude of the Court towards that meeting? A. I do not think so; I had been trying to get the conference.

Q. Well, let me put it to you expressly. Were you not informed by Colonel Stimson or by Mr. Hedges that that conference would be agreeable to the Court? A. I do not think so.

Q. Were you told that in substance? A. When I called up and said I was going to have the con-
437 ference and prepared the letter, I cannot remember even the substance.

Q. Your memory failed at the vital point? A. No, my memory is very good; I cannot remember every detail.

Q. So that you called up. Now, who did you call up? A. I could not tell you.

Q. Do you mean to say you have given us an independent act of memory that you called up, and then your memory suddenly fails, and you do not even remember who you called up? A. I do not know that I called up anybody in that connection.

438 Q. But you said you did? A. I will say now that I cannot remember any particular person. How can I remember what I did on the 6th of October, or the 1st of October?

Q. I should think you would remember very clearly, sir, whether this conference was being held in conformity with your ideas, or the judge of the Court, who was answerable to the receivership. I should think that would have made a great impression on you. A. This conference was called by me.

Q. Was it called in harmony with or at the suggestion of the Court? A. It was not called at the

439

suggestion of the Court. The Court, in all my conferences with him, was in accord with anything which helped to solve this problem.

Q. Then you believed, when you called this conference, that it was in harmony with the views of the Court? A. I should not want to call a conference that was against the views of the Court.

Q. Well, can you answer that question more precisely, sir. A. I cannot. I believed the Court would be glad to have me call such a conference, but I had no direct statement from him to that effect.

440

Q. Well, did you, in calling that conference, say that the traction companies must be prepared to make drastic concessions for any favors received? A. I did. That is not the first time I had said that.

Q. You said it and you meant it, didn't you? A. Absolutely.

Q. Well, now, as a matter of fact, the traction companies did not make, in your presence, or on record before you, any concessions whatever, did they? A. They offered concessions; they made none.

441

Mr. Matthews: I object to that.
The Court: Sustained.
Mr. Mooney: I except to that.

Q. Did you, during that conference, say that "It is to be assumed that they (meaning the traction companies) come here in that spirit"; did you say that? A. In the first letter, you mean?

Q. Excuse me, Mr. Nixon; will you pay some attention to my questions? A. I am paying attention to your questions, but I cannot be expected to remember every word that I said last October.

442

Q. Did you say in substance—you may, if you wish, refresh your recollection, but I am testing your recollection. Did you say, in substance, "So it is to be assumed that they come here in that spirit"? A. Yes.

Q. So all you had was the assumption, is that it?

Mr. Matthews: I do not think that is a fair question. Mr. Mooney has got the record in evidence, and he can read it, if he
443 pleases, from beginning to end. I do not think it is testing the witness' recollection.

The Court: Do you object?

Mr. Matthews: I object, yes, sir.

The Court: Sustained.

Mr. Mooney: I except.

Q. Did you write to the Comptroller, "It may be necessary to review figures and examine leases and agreements"?

Mr. Matthews: I object on the ground that
444 that is already in the letter in evidence.

The Court: Sustained.

Mr. Mooney: I do not suppose that a witness is put upon the stand to be a reproduction of a printed page. The witness must have been called for a purpose, and if he was called for a purpose of the Government, I do not know of any reason why contempt proceedings should proceed upon any other basis than an ordinary proceeding. It seems to me I have a right to examine the witness generally. I am not going to be fore-

445

stalled, I hope, by simply reading documents. If that were so there was no need of putting him on the stand.

The Court: He has identified his letter to Mr. Craig and Mr. Craig's letter to him. If this question relates to any of those letters I will sustain the objection.

Mr. Mooney: I wish to suggest to your Honor that at this hour of the examination, which has only proceeded now about three-quarters of an hour, to refer to counsel's first question on the subject as a needless 446
repetition is a rather unusual procedure.

The Court: Mr. Nixon's views are entirely immaterial to this conference.

Mr. Mooney: I am not going to rest my case on Mr. Nixon's views; I am not here to consider his views. I am here to consider what took place in connection with the writing and the receipt of this letter.

The Court: I will sustain the objection.

Mr. Mooney: I except.

Q. Did you believe that it would be necessary 447
to review figures and examine leases and agreements at that conference?

Same objection; same ruling; exception.

Q. Did you state, at that conference, that a valuation or appraisal of the properties would be necessary?

(Same objection; same ruling; exception).

448

Mr. Mooney: If your Honor please, I am at a loss to understand why I am not going to be allowed to cross examine this witness. I beg to call your special attention to the fact that the witness was examined orally as to what had taken place at the conference. Now, I submit, with great respect to the Court, that it is fundamental that if he should be allowed to give his oral statement upon the direct examination, I am entitled to examine him as to what took place at
449 that conference on my cross examination. Your Honor will bear in mind very distinctly that the Commissioner was not called merely to identify documents. He was asked what took place at that conference. I submit, without being wordy about the matter, that it is my right to cross examine him about the oral statements that have been made as to what took place at the conference.

The Court: The two letters are in evidence and the complete transcript produced
450 by the witness of what occurred at the meeting is in evidence. Now, if there is any inquiry as to something that is not reported, that, of course, will be entertained otherwise, no. The issue of the case is very simple and I propose to confine it to the issue. The objection is sustained.

Mr. Mooney: I except to that. I want to just say as I go along that I think the Court in under a misapprehension in thinking that this is a broadening of the issues. There is going to be no broadening of the issues here,

451

but we do not quite agree with the Court's idea that this is a simple issue.

The Court: I am not talking about the law in the case. I am talking about the relative facts.

Mr. Mooney: We consider all the surrounding facts are important here, but I do not want to assent to your Honor's proposition, that is all.

Q. Did you at that time have a memorandum already prepared for publication?

452

Mr. Matthews: I object.

The Court: Immaterial. You mean a memorandum of his?

Mr. Mooney: Yes.

The Court: Sustained.

Mr. Mooney: I except to that.

Q. Did you send a memorandum at the close of that meeting to the press for publication?

Mr. Matthews: I object; also immaterial.

453

The Court: Do you mean a memorandum of his own, or a memorandum?—

Mr. Mooney: A memorandum of what had taken place at the conference.

The Court: I will allow him to answer.

A. The Secretary of the Commission prepared a general resume of what took place, and sent it out.

Q. And that is in accordance with custom, is not it? A. Not necessarily. I do not always send out everything I do.

454 Q. Well, I did not say whether you always did, but that is a general custom, is it not, to hand out a statement, is it? A. I have stopped it of late. I had prepared, for your knowledge, I had prepared what I considered the fundamentals of this conference, and I read it so that there would be no mistake about it, instead of trying to explain it verbally.

Q. Surely you did not want the people to get through the press what you had said and not what other people had said, did you?

455 Mr. Matthews: I object to that, sir, as absolutely immaterial.

The Court: Sustained.

Q. Did you do this all beforehand? A. Of course, I prepared many general memoranda of what I thought should be done, beforehand. How could I have had it?

Q. And did you make arrangements for it to go to the press beforehand? A. No, I did not.

Q. Well, did you make it during the conference? A. No.

456 Q. Did you make it after the conference? A. I do not make these arrangements myself, any way.

Q. Is not it a fact that Mr. Pavey and others, as shown by the transcript here, requested that the matter be given out to the press? A. Yes.

Q. "Press" is great, big word; it is staring you right in the eye? A. Yes; right here.

Q. And it was after that that you sent out your account to the press, was not it, or directed that it de done? A. That reference to the Comptroller's letter, I think—I did not propose to make it public unless the Comptroller himself did.

457

Q. But you took two positions on that point, did not you; you took two entirely different positions on that point? At one time you said that you would not give the letter out without the consent of Mr. Craig and next you said that you would give it out, and that you would send it to the press. Now, you took those two positions? A. I did not say that I would send it to the press at all. I rather intended to send it to him than to the others.

Q. If your memory is not clear, I will read it. Are you reading the one that I like or the one I do not like? A. Both.

458

Q. Is not it a fact that you said that you would not give it out without the premission of the Comptroller; is not it? A. And I did not.

Q. Have you got any bias in this matter? A. Absolutely none whatever.

Q. Would you mind answering my questions, then? A. I said very plainly I am reading this, but, of course, I would not make the letter public unless the Comptroller himself does, and then Mr. Pavey asked me—of course, it is a personal question.

Q. Go ahead, it won't harm. The word "press" comes in there? A. Of course, this is a personal question; I would not be able to answer it.

459

Q. Just read a few words before that. A. I stated further that unless it would be a breach of official propriety, that the press be furnished a copy of the letter you have just read—I do not thing that makes sense.

Q. Oh, yes, it makes very good sense. A. Well, I do not understand it, that is all.

Q. Well, then, let me read it. A. From Mr. Pavey on.

460 Q. I have written it out here for you; let me read it. See whether this makes pretty good sense: "Mr. Pavey: May I suggest further that unless it would be a breach of official propriety—and it does not seem to me it would—that the press be furnished with a copy of the letter which you have just read. Of course, that is a personal question and I would not be able to answer it." Now, as I read it from my notes, and you, with the printed page in front of you, does it not commence to look like sense? A. You mean to say that he could not
461 answer it for me. I do not see where it is relevant. I am trying to meet your point of view.

Q. You are not meeting my point of view at all. You said what it says, did not you? A. Surely.

Q. Well, now, did not you immediately answer that: "Commissioner Nixon: Of course, I will send it (meaning the letter) with a copy of what I wrote, and the remarks of the different men." Is not that what happened? Did not you say that? A. I did.

Q. Now, that was your second statement. And then spoke up Mr. Stimson, did not he? A. No,
462 Mr. Hedges seems to follow—oh, then Mr. Stimson; yes.

Q. Up spoke Mr. Hedges and then up spoke Mr. Stimson, did not he? A. Yes, sir.

Q. And they voiced very unfriendly sentiments about the Comptroller, did not they, as appears by this record? A. I think they did; yes.

Q. And, of course, you knew where they stood, did not you?

Mr. Matthews: I object to that.

The Court: Sustained.

463

Q. Well, anyway, as soon as they had spoken up, you had a change of mind, did not you?

Mr. Matthews: Objected to as immaterial.

The Court: Sustained.

Mr. Mooney: I except.

Q. Did you mean to carry out your promise of sending it to the press when you made that statement?

464

Mr. Matthews: I object to that. There is no promise of sending it to the press.

A. I thought it would take several days to prepare this, and when it was gotten out the press or anybody else could use it.

Q. I asked you such a simple question—did you mean it when you said it? A. Oh, I mean whatever I say.

Q. Well, then, if you meant it why did not you do it? A. Why did not I send it out to the press?

Q. Yes; did you want to suppress it or hold it back? A. Well, we sent out a general memorandum of the whole meeting on the basis that I had prepared, but without the letter, because at that time the letter had not been given to the press and I said I would not give it to the press unless the Comptroller did. 465

Q. Yes; that is what you said before. But this was afterwards, it was after Mr. Stimson and Mr. Hedges had spoken, was not it? A. Not at all. Mr. Stimson asked for the letter and I said I would send it to the judge. I did not say I would send it to the public.

466 Q. The first position was that you would not give it out without the Comptroller's permission? A. I did not say that at all. I said I would not give it out to the press until the Comptroller did, and I meant it.

Q. Well, if you insist upon my doing it, I will read you from the record. Did you state as follows, on page 32: "I am reading this, but of course I shall not make the letter public unless the Comptroller himself does." Now, did you say that? A. Surely.

467 Q. Did you, after Mr. Hedges and after Mr. Stimson had spoken, did you then say, "I shall be obliged to send it to the judge," at page 35; did you say that? A. Yes, I said it or it would not be in the record.

Q. Then, after Mr. Pavey had spoken and asked it to go to the press, did you then say, upon the latter page to which we have just referred, "I will send it (that is, page 33) with a copy of what I wrote and the remarks of the different men." Now, did you say that? A. Yes, surely.

468 Mr. Matthews: Mr. Mooney, I am sure, did not intend to jump about; but he got his numbers all out of sequence.

Mr. Mooney: Well, if I did, you put them right, will you, because nobody wants to be misunderstood.

Mr. Caffey: You read from page 35 and then subsequently read from page 33.

Mr. Mooney: Naturally I did, and I said "page 33" as loud as I could talk, so the stenographer could hear, just so that I should not be picked up.

469

Q. Now, therefore, until Mr. Stimson spoke up and until Mr. Hedges spoke up, you thought that this was a proper matter for the press; isn't that so?

Mr. Caffey: Objected to as immaterial and irrelevant.

The Court: Sustained.

Mr. Mooney: I except.

Q. What was it caused you to change your mind with reference to giving out the letter on that day? 470

Mr. Matthews: I object to that.

The Court: Sustained as irrelevant.

Mr. Mooney: I except.

Q. Did you give this letter to Mr. Stimson; did you hand it to him?

Mr. Matthews: I object to that.

The Court: Overruled; he may answer it. Do you mean the letter or a copy?

Q. Well, let it stand for a moment. A. I do not know whether I gave him the letter or a carbon; but I think I gave him a copy. 471

Q. In other words, he asked for it, did not he? A. Yes.

Q. And you knew he wanted to make trouble for the Comptroller, did not you?

Mr. Matthews: That is objected to.

(Objection sustained.)

Mr. Mooney: I submit it is proper on the question of bias, your Honor, if nothing else.

The Court: Sustained.

472

Q. Did you know what he was going to do with the letter?

(Objected to; sustained; exception.)

Q. Did he use the expression that he would act as your messenger to carry it over to the judge? A. Oh, no.

(Objected to; overruled.)

473 Q. What did he say, in substance?

Mr. Matthews: Same objection.
The Court: Allowed.

A. He wanted to know if he could get a copy of the letter. He did not get a copy of the letter until I had a message that the letter had been given to the press.

Mr. Mooney: I move to strike that out. The witness stated that he had no bias, but he certainly is exhibiting it. I move to strike
474 it out, sir.
The Court: Strike it out.

Q. You used the expression in your own words, "I will send it to the judge." Now, did you send it by Mr. Stimson? A. I suppose Colonel Stimson took it.

Q. He asked for it, did not he? A. He did, yes; of course he did.

Q. And you knew when he asked for it that he wanted to make trouble for the Comptroller, didn't you?

(Objection; sustained.)

475

Q. It is very unusual for you to carry on your official communications by the hand of men like Mr. Stimson, prominent members of the Bar?

(Objection; sustained: exception.)

Q. Did you send to his Honor a copy of the original of this paper in any other way than by handing it to Mr. Stimson?

(Objection; overruled.)

476

A. I do not remember; I think my secretary sent a copy or the original—I don't know—to the judge or someone; it was sent to someone.

Q. So as to shorten it, that last answer is just guessing, isn't it, because a thing has either got to be in or out of the record? A. I do not remember that it was.

Q. That is the answer, you do not know? A. Yes.

Q. What did Mr. Stimson say to you when you gave him the letter?

(Objection; sustained; exception.) 477

Mr. Mooney: I submit that your Honor has ruled in what was done with the letter, and anything that was said in the giving of the letter is competent, but if that does not present an individual view to your Honor I will proceed.

Q. Did you know what Mr. Stimson was going to do with the letter when you gave it to him?

(Same objection; same ruling; exception.)

478 Q. Did Mr. Stimson, during that conference, say: "I think that a copy of that letter should be sent at once to Judge Mayer"?

Mr. Matthews: I object.

The Court: Sustained; it is in evidence already.

Mr. Matthews: Do not answer, Mr. Nixon.

Mr. Mooney: The witness is looking at the paper and I insist that he has testified
479 to several matters from memory on direct, and I am testing his memory now.

The Court: There is a good deal in that record that is immaterial, but it was received. Objection sustained.

Mr. Mooney: I except. I say this, your Honor, that the question of animus is important, in our view, in any contempt proceeding. While it is a question of the dignity of the Court, the question of contempt of the Court, yet if a proceeding be fomented or if it be upheld by those who have an ani-
480 mus against the defendant, it is of importance, in our view, to show that circumstance.

The Court: It is entirely irrelevant, any personal likes or dislikes.

Q. Do you remember Mr. Stimson saying. "It has been read at the meeting here and a meeting at which there is a stenographer and presumably has been taken down by him"; do you remember Mr. Stimson making reference to that?

(Same objection; same ruling.)

481

Q. Well, Mr. Stimson's name seems to be what is causing the trouble. May I ask a question without reference to Mr. Stimson? Did some one at that conference say—

Mr. Matthews: Same objection. Mr. Stimson's name means nothing, one way or the other, so fas as my objection goes.

The Court: Same ruling.

Mr. Mooney: I never heard Mr. Matthews object so promptly. He stands on his feet while I am cross examining the witness. 482

The Court: This Court endeavors to rule promptly.

Q. Now, is it a true statement in that record; do you know whether that record is a true statement or not? A. As near as I can follow it, yes. It is about what was said. I assume stenographers can make mistakes.

Q. Would you vary it at all? You have read it and read it this morning. I want to make sure before you leave the stand that somebody will not come along and correct that record out of sight for me. A. I think that is a fair statement of 483 everything that was said at that meeting.

Q. Was there an executive session that was not recorded in that pamphlet?

The Court: On that day, you mean?

Q. Yes, sir; on that day, immediately following? A. Yes.

Q. Who were asked to attend that executive session?

(Objection; sustained.)

484 A. I do not know whether we called an executive session or not.

Mr. Mooney: Now, your Honor, I make this suggestion in the best of feeling, but these objections that are fired in so promptly and that are ruled on by your Honor before you have occasion to hear me for a word or for a second, are quite too expeditious, it seems to me, for us to get at what we think from our standpoint is the root of this thing.

485 The Court: Objection sustained.

Mr. Mooney: Well, now, may there be a pause after the objection is made, so that I may have a right to be heard? It seems to me that it is proper that I should be heard on that objection.

The Court: It depends on the question and the objection. If I think it is arguable, I will wait; if I do not think so, I won't.

Mr. Mooney: I want to spread upon the record the fact that what was done on that day in connection with this matter, or, even
486 if it be thought by the witness or the Court not to be in connection with this matter, is of vital interest to my client. In other words, what I intend to show your Honor is that something was done with respect to this letter. Now, clearly that door ought not to be closed to me. I do not want to try this case in the dark. Now, something was done with regard to the letter, your Honor. Now, clearly that door ought not to be slammed in my face at that minute.

The Court: I do not know what you are

talking about. If you put the question direct then I can understand it better. 487

Mr. Mooney: You have referred to an executive session that took place immediately after the proceeding, which is noted at the end of this printed record, isn't it?

The Court: I regard that as entirely immaterial to the issue.

Mr. Mooney: First we have got that there was an executive session. Certainly a contempt proceeding is not going to stand or fall as to whether it was an executive session, or, secondly, as to when it took place. Now, I am asking whether it took place immediately after the meeting; I want to show the continuity of the thing. 488

Mr. Matthews: Mr. Mooney is cross examining a witness called for the Government. That witness testified to two or three or four particular matters on direct. He has cross examined him at large as to each of those. Now he is going beyond the examination on direct. No door has been slammed in his face. He has been cut off from nothing. No objections have been made except when the question were so obviously irrelevant and immaterial as to draw out a lengthy proceeding. If he wants to make out any of those matters when he comes to his own case, witnesses will be available and he can go into it at that time. 489

Mr. Mooney: A witness should not be allowed, as a matter of law, to divide a thing which takes place on one day into several sequences and to cut us off from inquiring into what took place on that day, and that

490 is no disrespect to the witness. The witness called it an executive session and I have no quarrel with the term.

The Witness: No, you called it an executive session. I had a meeting; it was closed. You can call it any thing you want.

Mr. Mooney: It seems to me that what took place on the day the Government has the witness to testify to, I ought to be allowed to inquire about.

The Court: The Court disagrees and will
491 sustain the objection.

Mr. Mooney: We except.

Q. Did you make a comment during the reading of Mr. Craig's, the Comptroller's, letter?

Mr. Matthews: I object to that.

The Court: I will sustain the objection.

Mr. Mooney: I submit, your Honor, that that relates to the question of what was done with the letter. Surely this is the first public appearance or quasi-public appearance, whatever my learned friend might claim it
492 was.

The Court: Where is it?

Mr. Matthews: Page 29, sir.

Mr. Mooney: I submit that I am not expected to cross examine the stenographic record. This is the first time I ever cross examined a stenographic record in my life. I never heard of the principle of law to stand up here and cross examine the stenographic record.

The Court: You put this in evidence yourself.

493

Mr. Mooney: Suppose I did, sir. I have a right to take every standpoint.

The Court: Objection sustained.

Mr. Mooney: Exception.

Q. Do not answer until his Honor rules on it. Is the statement in the stenographic record attributed to you, in the middle of the reading of the letter, is that correct?

(Same objection; same ruling; exception.)

494

Q. Did you make any comments during the reading of this letter?

Mr. Matthews: Same objection.

Mr. Mooney: Surely I am entitled to have something appear here that took place at this time. This was not any in camera, where the thing is to be hidden from either the public or the world at large. There was nothing so secret about this situation. We are here to answer for the writing or publication of a letter, and is it possible that the man into whose hands the letter first went and who read it, is not to be asked whether he made any comments during the reading of the letter?

495

The Court: His comments are immaterial. Sustained.

Mr. Mooney: Exception.

Q. Did you say during that conference that if the plans which you had outlined were followed out, that the original sources must be disclosed?

496 Mr. Caffey: Objected to as immaterial.

The Court: Sustained as immaterial.

Mr. Mooney: When I use the expression "original sources," then your Honor will make, I think, the same ruling, if I say, "the original sources of information concerning the property and affairs of the various public utility corporations holding franchises to operate in the streets of New York"—that is incorporated in the question, and your Honor makes the same ruling?

497 The Court: Certainly.

Mr. Mooney: And I take an exception.

Q. Did you talk to any newspaper men on the day after that hearing? A. Quite a number of them.

Q. And did you then give out the statement for publication? A. No.

Q. The Secretary attended to that? A. Oh, that was some time after that before the Secretary gave out the minutes.

Q. Well, he certainly gave it out for publication
498 that night, didn't he? A. Yes; this was about the middle of the day.

Q. Do you remember Mr. Hedges saying, even after the newspaper men had been excluded, that every word of what was going on would be in the afternoon papers, and that it would also be in the next morning's papers; do you remember him saying that? A. He may have said that. He said something of that nature, but I do not remember.

Q. And you wanted it in the newspapers, did not you? A. I did not care one bit whether it was in the newspapers or not. I wanted the conference and I thought I was going to produce one result with it.

499

Q. Who broke it up, Mr. Stimson or the Comptroller?

(Objected to; sustained.)

Q. Who broke it up? A. It never was broken up; it went on for months.

Q. Well, you never did these various things that you hoped for, did you? A. I got a mighty good start towards it.

Q. Did the conference break up? A. Which conference?

500

Q. This conference.

(Objection; sustained).

Q. You have stated in effect that recently you changed your habits; that you do not give out so much to the press. Was it because of this experience?

(Objection; sustained.)

Q. How recently is it since you have adopted the latter practice?

501

(Same objection; same ruling.)

Q. Did Mr. Stimson report to you after seeing the judge?

Mr. Matthews: Same objection; we have objected to that line of questioning.

The Court: Sustained.

Q. Did you talk with Mr. Stimson about this letter after you had given him this letter to hand it to the judge?

502

Mr. Matthews: Same objection on the same grounds—irrelevant, immaterial.

The Court: Same ruling.

Q. Now, will you please make sure beyond questioning by others later, if you can, whether it was the original letter or a copy that you handed to Mr. Stimson? A. I really do not remember.

Q. Well, cannot you remember whether the original left your office? A. No; I do not know anything about it. I do not file the letters, you know.

503 Q. Is not it a fact, Mr. Nixon, that you knew that this contempt proceeding was initiated against Mr. Craig before 1 o'clock on the day before any publication of this letter had been had in the public press—did you know of that?

(Objection; sustained.)

Q. Did you know anything about the time of the initiation of this proceeding?

Mr. Matthews: I object.

The Court: Overruled; he may answer.

504 A. No.

Mr. Mooney: That is all.

The Court: Anything more?

Mr. Matthews: Yes, one or two questions.

Re-direct Examination by Mr. Matthews:

Q Mr. Nixon, Mr. Mooney just asked you about the delivery of the original letter. I show you a letter from you to the United States Attorney, dated October 8th, and ask you if that refreshes your recollection as to what was done by you with

505

the original of the letter from Mr. Craig to you, referring to Government's Exhibit No. 2? A. Yes, that letter I wrote.

Q. Does that refresh your recollection as to the disposition of the original? A. Yes, I must have given a copy of the letter to—my secretary gave it to Mr. Stimson, if one was given. I think it was, and kept the original and finally sent it to you or to the United States Attorney.

Q. You testified concerning the resume of the conference which was given to the press. Did that resume contain a copy or a reference to the letter 506
from Mr. Craig? A. I do not think as prepared it did. The letter was given out to the press some time before the resume was given out by the office. What it contained I do not know without looking at the papers.

Q. You were questioned about furnishing a copy of this letter to Mr. Stimson.

Mr. Mooney: I move to strike out that latter statement, your Honor. I do not quite understand the position of the witness. He certainly has no bias. 507

The Witness: I have no bias.

Mr. Mooney: I move to strike out "the letter was given out to the press some time before" and so forth. That is hearsay.

The Court: Strike it out.

Q. Had you seen a report in the New York papers of the letter from Mr. Craig to you before the resume was given out by your office?

Mr. Mooney: I object to that, your Honor.

The Court: Fix the time.

508

A. I do not know when the resume was given out by the secretary.

Q. You did not give it out yourself, personally? A. No, the prepared statement, I do not know whether that embodied the letter or not.

Q. You do not know anything about that yourself? A. I do not remember a thing about it.

Q. I understood you to say, in answer to one of Mr. Mooney's questions, that no one got a copy of the Craig letter from you until you had word that it was in the press?

509

Mr. Mooney: I submit that there is no such thing as that in the record.

The Court: I do not so understand it.

Mr. Matthews: That was my understanding; I had a note of it.

Q. Did you make that statement, Mr. Nixon? A. I think he asked me that question.

Q. Will you state the fact with respect to that. I do not want to misstate the testimony? A. You mean when the letter was permitted to go?

510

Q. Yes. A. Why, my secretary came in. I was debating whether I should give it at all, even to Colonel Stimson, and my secretary came in and said, "You need not bother about it; one of the reporters says that they have telegraphed the letters at the City Hall." And I said, "Do as you please."

Mr. Mooney: I object to that.

The Court: Motion granted.

Mr. Matthews: Subject to being restated later?

The Court: Yes, you may ask it again if it comes up.

511

Q. I understand that you did not give out a copy of the Comptroller's letter until you received information that the press already had it?

Mr. Mooney: I object to that as involvin a series of mental operations of physical facts.

The Court: Yes, I will sustain the objection. You do not know just what time the secretary gave out that memorandum, do you?

The Witness: Oh, it was given out after 512
I left.

Mr. Matthews: I am referring to the copy of the Craig letter that was given out by you apparently to Mr. Stimson, as fixing the time at which he gave that copy to Mr. Stimson.

The Court: The question now is confined to the time that the witness gave the letter to Colonel Stimson?

Mr. Matthews: Yes, sir.

The Court: And in respect to the publication of Mr. Craig's letter in the newspaper? 513

The Witness: He said it was given out to the City Hall reporters.

Mr. Mooney: I submit that counsel is opening up a line here that your Honor ruled out on his objection.

The Court: I will take it now.

Mr. Matthews: All of it was stricken out subject to being restated later.

Mr. Mooney: Your Honor, I want to say—

The Court: I will grant that it be stricken out.

514

Mr. Mooney: The whole thing?

The Court: That is, that part about the secretary having information about the reporters.

Mr. Mooney: I ask your Honor's ruling as far as it goes. But I say that this method of re-direct examination, in view of your Honor's ruling, is an inversion of the way of conducting a case in orderly procedure, and it shows that the theory of the learned District Attorney is other, in presenting

515 his case, than such as would be evinced by his objections and your Honor's rulings upon the testimony.

The Court: As the matter now stands, the witness has testified that he delivered or caused to be delivered a copy of the letter to Mr. Stimson. That is as far as it goes.

Q. The contract to which you referred and as to which you had a general knowledge is a contract that has been in existence for some time between the Public Service Commission and the official re-

516 porters? A. I think they run for a year. They were made by the last Commission.

Q. And this work was done in the regular course of business in reporting conferences? A. Absolutely the same.

Q. Can you fix the time at which the first copy or first transcript of the testimony of the stenographer was delivered to the Public Service Commission?

Mr. Mooney: If it is within his personal knowledge.

Mr. Matthews: That is what I mean.

A. No, I cannot.

517

Q. Who would have personal knowledge of that? A. Mr. Walker, I think—Mr. Walker or Mr. Robinson.

Q. I understood you to say that you sent a copy of your letter of April 1st to Mr. Craig to a great many other persons. Are they substantially the persons mentioned on pages 4 and 5 and 6 of Defendant's Exhibit B? A. I think they are, yes. Whether that represents all of them or not I could not say.

518

Mr. Mooney: So as to complete your record, you better ask whether they were also sent to the persons stated on the first page, because the first page says that an identical letter was sent to the public officials named, so that the list inside is incomplete.

Q. I also, then, include in my question page 1, and I understand your answer will be the same? A. I directed that they be sent to all of them.

Re-cross Examination by Mr. Mooney.

519

Q. Let me see the letter that the District Attorney put in evidence.

Mr. Matthews: I did not put it in.

Q. What prompted you to send your letter to the District Attorney? A. I think a telephone message that I send it—requesting that I send it.

Q. Had you been, prior to that conference, with the District Attorney? A. No, I have never been in conference with him.

520

Mr. Mooney: Better have that marked.

Mr. Matthews: No objection; I will offer it.

Letter marked Plaintiff's Exhibit No. 3.

The Court: Is that all of Mr. Nixon?

By Mr. Matthews:

Q. Mr. Nixon, do you recall my calling on you at the office of the Public Service Commission about it? A. Yes, I recall that now.

521

Q. I think I telephoned beforehand? A. Yes.

Q. And then you addressed this letter to Mr. Caffey and delivered it to me with the enclosures therein referred to? A. Yes.

GEORGE F. DOBSON, JR., a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

522

Q. Mr. Dobson, what is your business? A. Reporter.

Q. On October 6, 1919, what was your business? A. Reporter for the New York Evening World.

Q. Do you recall going to the office of the Public Service Commission in this district on that day? A. I do.

Q. Did you attend a conference there? A. In part.

Q. What do you mean, in part? A. I attended as long as it was an open session.

523

Q. And then the reporters were excluded from the room? A. They were.

Q. When the conference was over, did you go up to the office of Comptroller Craig? A. No, sir.

Q. Did you telephone to his office? A. I did.

Q. With whom did you speak? A. His secretary.

Q. Had you known his secretary before that time? A. Yes, sir.

Q. What is his secretary's name? A. Charles Kerrigan.

524

Q. Did you recognize his voice over the telephone? A. Yes.

Mr. Mooney: I move to strike out the characterization of Mr. Kerrigan as secretary to Mr. Craig, because this is a thing for the court to take judicial notice of; Mr. Kerrigan is not Mr. Craig's secretary. He is the secretary of the Department of Finance of the City of New York, which is a statutory office.

The Court: Let it so appear on the record.

525

Mr. Mooney: —and then the answer of the witness will be deemed to be limited by that fact, because that makes a great difference.

The Court: Very good.

Q. Did you have a conversation with Mr. Kerrigan over the telephone with respect to the conference at the office of the Public Service Commission?

Mr. Mooney: I object to any talk with Mr. Kerrigan as not binding on this defend-

526 ant. He is in no sense the agent or servant of the defendant, nor authorized or empowered to do any act or make any declaration which would be binding upon the defendant.

The Court: I will take it subject to a motion to strike out.

Mr. Mooney: I except to your Honor even taking it with that qualification. That will go to the meat of this case, because it is evidence either of the highest importance,
527 or it has no value whatever, and, since it is of that kind and character, I submit it is not of the class subject to a motion to strike out. A defendant cannot be bound by a statement by another with reference to the very subject-matter at issue. Now, Mr. Kerrigan has no authority, so far as now appears, and I assume can not have any authority within his official statutory title that would be binding on the Comptroller. Whatever Mr. Kerrigan may have said is not binding on the Comptroller. I submit it is
528 not proper even to take it subject to the qualification stated by your Honor.

The Court: I will take it subject to a motion to strike out.

Q. Will you state the substance of your conversation with Mr. Kerrigan? A. I asked him on the phone if I could have a copy of the letter written by the Comptroller to the traction companies at the conference; that I wished to have it for my paper, and, in substance, he replied that if I would go down to the City Hall reporters' room I would find it there by the time I got there.

529

Q. Did you go to the City Hall reporters' room thereafter? A. I did.

Q. Did you find a copy of the letter there?

Mr. Mooney: I object to that, your Honor, as not connected, and so there shan't be any doubt as to the propriety of the time of moving to strike out, as soon as you Honor has passed upon this question, why, I wish to be heard upon the other.

The Court: I will take it subject to the motion to strike out. That motion of yours 530
may be made either at the end of Mr. Dobson's testimony or at any other time during the trial.

Mr. Mooney: I except.

The Court: You may answer.

Q. Did you find a copy of that letter at the City Hall? A. I did not.

Q. Did you go to the City Hall? A. I did, and I found that the copy which—

Mr. Mooney: One moment; I think you answered. 531

Q. What time did you get to the City Hall? A. I should say within fifteen minutes after I left the Public Service Commission.

Q. Can you fix the time you left the Public Service Commission? A. Not exactly.

Q. Give it to us as nearly as you can fix it. A. Say about 12:30.

Q. About 12:30; after you got to the City Hall and you say you found no copy of the so-called Craig letter there? A. I did not look for a copy.

532 The copy which I expected to get had been sent to my office.

Q. Did you then write up a report of the incidents of that morning?

Mr. Mooney: I move to strike out the answer of the witness; that is a series of conclusions, because he says that the copy that he expected to get—he was only asked "did you find it there" and he says "the copy that I expected to get had been sent to
533 my office." Now, surely that is both hearsay and complex. We do not know whether a copy was sent to his office.

The Court: What is the motion now?

Mr. Mooney: Motion to strike it out, your Honor.

The Court: Strike it out, whatever the words were, that he found a copy was sent to his office.

Mr. Mooney: He says, "the copy that I expected was sent to my office."

The Court: That is stricken out.

534 Q. Are you familiar with The Evening World as it was published on October 6th? A. I think so.

Q. I ask you if this is a copy of the paper which was published that day (handing newspaper to witness)? A. I think so, yes.

Q. Can you state what the general circulation of the Evening World is? A. I cannot.

Q. State as nearly as you know.

Mr. Mooney: I submit, your Honor, there is no basis for these questions; no connection made or laid.

535

The Court: Sustained.

Mr. Matthews: I offer in evidence the paper identified by the witness.

Mr. Mooney: I object to it on the ground that there is no basis or foundation laid at this time.

The Court: I will receive it for identification only.

(Newspaper marked Government's Exhibit No. 4 for Identification.)

The Court: The paper is one in general circulation?

536

The Witness: Yes.

Mr. Matthews: That is all.

Cross examination by Mr. Mooney:

Q. Mr. Dobson, were you served with a subpoena to go before the Grand Jury and testify in connection with this matter of the contempt of Mr. Craig?

Mr. Matthews: I object. It is immaterial whether he was served or not.

The Court: I will allow it. The question was whether you were served with a subpoena.

537

A. I do not know.

Q. Were you requested to go over to Colonel Caffey's office? A. In connection with the Grand Jury?

Q. In connection with the matters that you have testified to here?

The Court: Irrespective of any question of the Grand Jury?

A. Yes, I was at one time.

538

Q. And did you come over? A. I did.

Q. And did you make a statement in writing? A. Yes, in writing, I did.

Q. And did you sign it? A. I would not be sure that I made it in writing. I know I made a statement.

Q. And to whom did you make the statement, either orally or in writing? A. To Mr. Matthews.

Q. And how long ago was that? A. I do not recollect; some time ago.

Q. I would like you to try to remember about
539 the question of a statement in writing. I would like to suggest to you that counsel for the defendant is reliably informed that statements have been made in writing by some of the reporters, and, taking that as a basis for your recollection, I would like to ask you whether your recollection, as thus spurred, or refreshed, does not bring you to say that you did sign a statement?

Mr. Matthews: That is entirely immaterial.

The Court: Overruled.

540

A. My recollection is that no statement was made in writing and I am almost certain that I did not sign any such statement.

Q. When I spoke of a Grand Jury subpoena, did you receive a paper marked "John Doe—in the matter of contempt"? A. At the start of this proceeding?

Q. Yes. A. I think I did.

Q. And was it after you received that that you went to Mr. Matthews' office? A. It may have been; I cannot recollect whether it was after or before.

541

Q. Of course, you reporters are somewhat familiar with John Doe proceedings. Does not that spur your recollection, that it was a Grand Jury subpoena? A. I do not remember the type of subpoena that was served upon me. I know that there was a subpoena served upon me, but that is all.

Q. Is not this what took place—I think I can refresh your recollection again. Did not they give you a subpoena and in the corner of that subpoena read "Contempt—John Doe," and you came over here and had a talk with Mr. Matthews and made a statement to Mr. Matthews, and instead of going 542
into the Grand Jury room he said, "That is all," and you went on about your business; is not that what took place? A. I do not know whether I saw Mr. Matthews before I was served with the subpoena or not. I do know that I came over here and made a statement to him. My recollection is that I did not sign any paper.

Q. But I am on the question of this subpoena, do you see. I want to develop about the subpoena. The question is whether these witnesses, of whom you are one, have been served with subpoenas to attend before the Grand Jury in developing testi- 543
mony in this proceeding. That is what I am after. Now, do you recall—I do not expect you to recall every part of it, but as much as you remember—that you got a John Doe paper, and was not that John Doe paper a subpoena which said, in substance and effect, "you are commanded to appear before the Grand Jury of the United States, sitting in the Post Office Building?" A. I do not remember anything about the Grand Jury in the subpoena that was served on me.

Q. You are not talking about the subpoena that called on you to appear here today, are you? You

544 are talking about a paper served on you a long while ago, aren't you? A. I am almost certain that I never had a subpoena served upon me to go before the Grand Jury in this or any other case.

Q. What made you remember about this John Doe? A. I do not remember John Doe; those were your words.

Q. Did you assent to my words? A. I assented to the question that I was served with a subpoena; what type of subpoena I do not recollect.

Q. Well, when were you served with that sub-
545 poena? A. I do not know the date.

Mr. Mooney: I call on the District Attorney to produce the statement of the witness, if he made one in writing.

Mr. Caffey: You are not entitled to it.

Mr. Mooney: That is frank. I know you must be proceeding according to your rules.

Mr. Caffey: Absolutely

Q. Has anything that has occurred in the court room since you went on the stand, tended to refresh your recollection as to whether you made a state-
546 ment in writing? A. I am almost convinced that I did not make anything in writing.

Q. You are on The Globe now, are not you? A. I am.

Q. How long after October 6th did you remain with The World? A. Several months.

Q. Was your regular place of getting news at the City Hall; you were what is known as one of the City Hall reporters, weren't you? A. Not with The World, no.

Q. Did The World have a separate reporting staff

547

for the Public Service Commission? A. They had a man assigned to it during the traction trouble.

Q. And you were that man? A. I was.

Q. And so when you went there at 12:30 on that day, you went there to report a proceeding, if there was any proceeding to report, that you could; isn't that right? A. I went there earlier than 12:30.

Q. And were you in the room when the suggestion or request was made that the newspaper men be excluded? A. I was.

Q. And did you walk out? A. I did.

548

Q. Well, lots of folks remained besides the lawyers, didn't they; some newspaper men were nice enough to walk out, but lots of folks remained, didn't they? There was a great big room full of folks? A. No newspaper men.

Q. No; I know there is an honor in the profession in that respect. If the newspaper men were requested to walk out, all newspaper men could do that according to the rules of your craft, would not they? A. I think so.

Q. That made you anxious to get the news as quick as you could? A. Yes.

549

Q. In other words, the mere fact that you were being ruled out of the room on a matter which affected the people of the City of New York and payment of fare on the railways, that made you pretty keen for the news, did not it, and you would get that if you could, would not you? A. Yes.

Q. And you did your best to get it, did not you? A. I did.

Q. And to publish it as quick as you could get it? A. Yes.

Q. And in your opinion as a newspaper man in the City of New York, could any of those proceed

550 ings at that conference have been kept from the public press? A. I think so, if those who were in the conference did not divulge what happened.

Q. Well, but I am talking about the conference such as there was there that day. Would not you newspaper men have uncovered that either from the stenographer or some of those men who were present there, and really gotten it into the press? A. We would have tried to.

Q. And did you ever fail in a case like that?

551 The Court: That is immaterial.

Q. Where the public is concerned?

The Court: I will let it in.

A. Well, that is a pretty broad question. You often fail on stories, of course.

Q. On stories, of course. A. We would have tried our best to get the story, I know that.

Q. And is it not your belief that you would have gotten it? A. Sooner or later we probably would have.

552 Q. It is only a question of time, is not it? If you were assigned there, you would get it if you could get it? A. If I possibly could.

Q. And the other boys would do the same thing, would not they—excuse the expression "boys"—if they could get it? A. Yes.

Q. And if any man or set of men tried to turn you down, they would not be regarded as friends of the paper, would they? A. Oh, I would not want to answer that.

Q. Well, you do know, of course, that what was published in the paper you knew; this is your arti-

553

cle, is not it—just to identify it, for identification; is that your article (handing paper to witness)? A. Part of it, yes—the introduction and down to the quotation of the letter itself.

The Court: Better have that marked by the clerk.

Mr. Mooney: For identification.

Marked Defendant's Exhibit C for identification.

554

Q. When you called up Mr. Kerrigan, did you tell Mr. Kerrigan that you knew that the letter had been read? A. I told him I understood there had been a letter read, written by the Comptroller, and that Commissioner Nixon had declined to give out the letter to me when I requested it, and I would like to have a copy of it from him.

Q. Now, you knew, did not you, as a newspaper man there covering that work, that there was a stenographic staff there, didn't you, taking down everything that took place; you knew, didn't you, that in the course of time what took place in there would come out in the stenographer's notes, didn't you; and you knew generally, without knowing the particulars, that there was an arrangement between the Public Service Commission and the stenographer by which the stenographer was authorized and empowered to give out the transcript to everybody? A. No, I did not know that.

555

Q. Perhaps I am putting it too much in legal language. You did know that anybody who gave the fee to the stenographer was entitled to a copy of the proceedings; you knew that, didn't you? A. No, I did not know at that time that you could have a transcript by paying the fee. I did know that

556 you could get a copy of it, but I also knew that it would take several days to get that copy.

Q. In other words, they do not work as fast as the newspaper men. From whom did you understand—I am only asking you the name—from whom did you understand that this letter had been read? Who told you about that? A. It was either Commissioner Nixon or his secretary, Mr. Gleason.

Q. And do you remember the expression that was used by either one of them, that there was a "hot" letter from the Comptroller? A. I do not remember
557 that exact language, but I do know that I was told there was a letter which created quite a sensation at the conference, and I therefore asked for it and they would not give it to me.

Q. And, according to the rules of your craft, you would not stop until you got that letter, if you could get it, would you? A. I would certainly try to get it.

Q. If anybody else got it and you did not get it, it would be known as a beat, wouldn't it? A. Yes.

Q. And that is against-- A. The ethics of the profession.

558 Q. Well, now, did the man who turned this thing in, being the other part of the article in this particular case, did this man, on your own paper, claim that he had a beat on you with the letter? A. I think not.

Q. Well, you did not get credit for the whole article, did you? A. I did not seek it. I did not look for credit. I was told when I reached the office—

Q. I am not allowed to go into particulars. I only asked whether you got credit for the whole article. A. We do not get credit or discredit. We had the story in the paper. That was my object.

559

Q. Did you know Mr. Kerrigan well? A. Yes, sir.

Q. Did you know his voice well? A. Yes.

Q. And are you pretty sure that this was his voice that talked to you over the telephone, or was it simply someone who responded to his name? A. No, I asked for his name and I am certain I had him on the 'phone.

Q. Have you now stated all you know about this matter—just yes or no? A. Yes.

Q. Did you turn in any report about an order of Judge Mayer? A. I did; I wrote that. 560

Q. In appearing as a witness here to-day, this being a contempt proceeding, which is a contempt alleged to have been committed against his Honor who sits on the bench, you are not at all in fear of stating all that you know, are you? You are not embarrassed by any idea that it would be distasteful to his Honor or to anybody else, are you? You stand indifferent? A. I am here to tell the truth; that is all.

Q. But that is not accompanied by any feeling of fear, is it? A. No, none whatever.

Q. You believe that it is your duty to tell all 561 that you know regardless of the fact that this is a contempt proceeding alleged to have been committed against his Honor who is sitting now in court? A. Yes, I do.

Q. Well, then, I am going to ask you what time you learned of Judge Mayer's order on that day? A. I called on the judge as soon as I got through with my story, with writing one introduction in the office, I called on the judge in his chambers to get a comment from the judge on the letter.

Q. And what time of the day was that? A. Within a few minutes after I had read the letter.

562

Q. And you then learned of the judge's order, did you? A. I asked the judge if he had any comment to make and he said he had not, and if I wished to discuss the matter I should see the Federal District Attorney.

Q. Did you then see him? A. I did.

Q. And then did you learn of the order? A. Yes, sir.

The Court: You mean you saw the District Attorney?

563 The Witness: Yes.

Q. And then the fact of the matter is that, so far as you are concerned—and you can only speak for yourself—you learned that a contempt proceeding had been instituted against the Comptroller, before the Comptroller's letter had been published in your paper; isn't that the fact? A. No, I had seen the letter by that time.

Q. You had what? A. I had seen the letter by that time.

Q. No, I said "published in your paper."

564

Mr. Mooney: May that be stricken out, your Honor.

The Court: No, I will let it stand.

Q. You misunderstood my question. The fact of the matter is that you knew his Honor had made an order, from your conversation with the District Attorney, to have Mr. Craig prosecuted for contempt?

Mr. Matthews: I do not think that is material. The order is in the record.

565

Mr. Mooney: Well, it is all here; do not let us split hairs.

Mr. Caffey: There is no splitting of hairs.

The Court: He may be asked if he knew at this time, from the information obtained from the District Attorney, that the Court had submitted an order to the District Attorney, and let the order speak for itself.

Q. You knew that before your publication was made in your paper, did not you? A. I do not know just what time our publication came out on the street for that edition, but it was at that or about the same time. 566

Q. Well, see how I can help you along. Of course, you are a careful man. You could not put anything in your paper about the issuance of the order unless you knew about the order to put it in the paper. Now, this article that was produced here does speak about the order? A. It does.

Q. So that it is a fact, then, that you knew about the order before it had ever been published in your paper; is not that so? A. It might have been in the preceding issue. 567

Mr. Mooney: May that be stricken out, that it "might have been?"

The Court: Yes.

Q. Mr. Dobson, it stands to reason you have looked at the paper which the lawyers have shown you—it stands to reason that you knew of the order made by Judge Mayer before the article appeared in your paper. A. Before that article appeared, yes, sir.

568 Q. And before any article appeared on this subject that you know of? A. Yes.

Mr. Mooney: That is all.

Re-direct Examination by Mr. Matthews.

Q. Had you learned of the publication of the letter distributed to the City Hall reporters prior to the time you visited Judge Mayer's chambers?

569 Mr. Mooney: I object to that, your Honor. In the first place, the word "publication" would be of the essence.

The Court: Yes, I will sustain it.

Q. Had you learned of the distribution of "flimsies" or copies of the letter—

Mr. Mooney: That would be hearsay, your Honor. That would be an aggregation of circumstances.

The Court: Yes; sustained. As the matter now stands, if I understand the testi-
570 mony, Mr. Dobson had a conversation with Kerrigan. The next step in time was of Mr. Dobson learning of the copy of the letter that was in the World office. After that he called, as he says, upon the judge. The judge referred him to the District Attorney and he there got the information concerning the order which was published in the paper. Now, as the testimony now stands, he learned of the existence of the letter prior to the information that came to him as to the order, but Mr. Mooney is right in ob-

571

jecting on points that might show publication of the City Hall, or through the City Hall reporters by hearsay.

Q. You were asked whether one of the other reporters did not get a beat on you in sending this letter over to the office before you got to the City Hall. Who was the man who handled the rest of the story? A. Daniel Breen.

Mr. Matthews: That is all.

572

Mr. Mooney: I move to strike out, your Honor, that part of the testimony of the witness relating to the conversation with Mr. Kerrigan, on the ground that it is not connected.

The Court: I will deny the motion with leave to renew.

Mr. Mooney: I will except also to the denial with leave to renew.

573

CHARLES F. KERRIGAN, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Kerrigan, what was your position on the 6th of October last? A. Secretary to the department of Finance of the City of New York.

Q. Who was the head of that department at that time? A. The Comptroller, Charles L. Craig.

Q. Do you recall talking with Comptroller Craig on that day respecting a letter which was addressed

574 by him to Commissioner Nixon? A. I think I do.

Q. Will you state when your first conversation, the first remarks that passed between you and Mr. Craig, occurred, and then state the substance of them? A. It might have been at lunch; I do not recall.

Q. You do not recall when? A. I do not recall the time.

Q. Did you speak to him about that letter more than once on that date? A. I think I did.

Q. How many times did you speak to him? A.
575 Well, possibly twice.

Q. When did you first speak to him, or did he first speak to you? A. I think it was at noon time, lunch time.

Q. You recall, do you not, that there was a meeting of the Board of Estimate & Apportionment on that day? A. No, sir.

Q. I mean—you do not recall that? A. Well, there was no meeting of the Board of Estimate & Apportionment as the Board, as far as I remember. There was a meeting of, I think, the Finance Budget Committee of the Board with the Finance
576 Department officers that day.

Q. And that committee is comprised of the entire Board of Estimate & Apportionment, is it not? A. Yes, sir.

Q. Do you recall about the time that meeting began? A. No, sir.

Q. The usual practice and custom at that time was for the meetings to begin at about 10:30 in the morning, was it not? A. Yes.

Q. Do you recall any variation from that usual practice on that particular day? A. Well, I could not tell you about that because I was not there when the Committee began its session.

577

Q. Were you present at all during the session? A. I do not recall—that is, during the morning I do not recall that I was. I know I was not there when the meeting began.

Q. And in referring to that meeting, at the time it usually began, can you now state definitely the time of the first conversation between you and Mr. Craig respecting his letter to Mr. Nixon? A. I could not tell you exactly, no, sir.

Q. It was before the beginning of the meeting of the Budget Committee, was it not? A. Yes, sir.

578

Q. You are positive about that, are you? A. Well, I was not there when they began the meeting.

Q. Well, did you see the Comptroller before he went to that session? A. No, sir.

Q. Are you positive about that? A. No.

Q. During the morning did you go to the meeting? A. I might have.

Q. Did you speak to the Comptroller? A. I am certain.

Q. Well, now, can you fix the approximate time of your first discussion with the Comptroller of this letter to Mr. Nixon? A. I think it was after they had finished their session.

579

Q. Do you know what time they had finished their session? A. I think about half past one or a quarter after one; something like that.

Q. I show you Government's Exhibit No. 2, and ask you if you ever saw that before (handing paper to witness)? A. I think so.

Q. Where did you see it? A. Why, in my office.

Q. Who was present and on what day was it

580 when you saw it? A. On this day that the letter was sent, on October 6th.

Q. Prior to its being sent to Mr. Nixon? A. If I saw it at all I saw it then; yes, sir.

Q. Your impression is, and your belief is, that you did see it prior to its being sent, is it not? A. That is my impression.

Q. Are you familiar with the Comptroller's handwriting, and can you say whether or not that is his signature? A. I think so, I am familiar with his signature.

581 Q. You have seen him write and know his handwriting? A. Yes, sir.

Q. And it is your belief that this is his signature? A. Yes, sir.

Q. That is your opinion. Now, when you first saw that letter can you state how it came to your notice? A. Yes, sir.

Q. I wish you would state that. A. I think the stenographer showed it to me.

The Court: You mean the stenographer in your department?

582 The Witness: The stenographer in our department; yes, sir.

Q. What is the name of that stenographer? A. Mr. Van Valkenburgh.

Q. Was anyone else present? A. Well, I could not answer that.

Q. What is that? A. I say I could not answer that; I do not remember.

Q. Was the Comptroller present? A. No, sir.

Q. Then what did Mr. Van Valkenburgh do with the letter? A. Why, I believe it was—he took it

after I had looked it over, and gave it to the messenger, or someone of that kind in the office. 583

Q. Did he give it to the messenger or did you give it to the messenger? A. Well, I could not answer that.

The Court: Was it signed at the time?
The Witness: I think so.

Q. Had you up to that time spoken to the Comptroller about it? A. No, sir.

Q. Had the Comptroller spoken to you about it? A. No, sir. 584

Q. Do you know the name of the messenger to whom it was delivered? A. No, sir.

Q. Did you hear the instructions given to the messenger? A. Why, as I recall the circumstance, either—I think Mr. Van Valkenburgh gave it to the messenger in my presence and told him to deliver it to Mr. Nixon—

Q. Did you read the letter through? A. Yes, sir.

Q. Did you have any copies of the letter made at that time? A. Yes, sir.

Q. How many? A. One. 585

Q. What did you do with the copy? A. I left that on my desk.

Q. Did you have additional copies made?

Mr. Mooney: One moment. I object to this, your Honor, upon the ground that from this point on the witness is not in a position to bind the defendant in this proceeding by any word or act of his. The witness is a statutory officer. He is an employee or an official of the City of New York,

586 paid by the County of New York, and is not in the employ of the Comptroller, nor the servant or agent of the Comptroller; and the evidence up to this point has distinctly shown that he had not spoken to the Comptroller with reference to the letter. Now, we have reached a point of importance where it is proper to interpose the objection which I have to make, and that is that it is incompetent to bind the Comptroller.

The Court: I will overrule the objection.

587 Mr. Mooney: I will except.

Q. (Question repeated) "Did you have additional copies made?" A. Yes, sir.

Q. How many?

Mr. Mooney: Same objection, and may it be taken to include this line of questioning?

The Court: It will be noted that this line is objected to, and Mr. Mooney may have an exception to each and every ruling of the Court.

588 A. I think about 20; possibly 20.

Q. On thin sheets, referred to as "flimsies"? A. Yes.

Q. At about what time were those copies made? A. At about, I think, about half past 12.

The Court: Was that before or after you lunched with Mr. Craig?

The Witness: That was before.

Q. Up to that time had you received any instructions from Mr. Craig respecting this letter? A. No, sir.

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Q. And according to your recollection you cannot fix the time at which you first spoke of the letter to Mr. Craig, or he spoke of it to you? A. Not very closely.

Q. Give us your best approximation of the time when you first talked with Mr. Craig about the letter? A. Well, it was—I know it was after I read it.

Q. And you read it at about what time? A. I think I might have read it—my recollection is this. The hearing was set for whatever time it was; the hearing was on before I read the letter, and I read 590 the letter, I believe, just before it was sent out and delivered to Commissioner Nixon.

Q. And it was after that that you spoke to Comptroller Craig about it for the first time? A. Yes, sir.

Q. You are positive that you had not spoken to him about it before, nor had he spoken about it to you before this time? A. Yes, sir.

Q. Well, now, will you state the substance of what Mr. Craig said to you and what you said to him when he spoke to you the first time about the letter?

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Mr. Mooney: I think I ought not, perhaps, to rely upon my general objection. I wish to state specifically that this evidence is incompetent.

The Court: Overruled.

Mr. Mooney: I except.

Q. (Question repeated) "Well, now, will you state the substance of what Mr. Craig said to you and what you said to him when he spoke to you the first time about the letter?"

592 The Court: You are now referring to the first time that Mr. Kerrigan spoke to Mr. Craig?

Mr. Matthews: Yes, sir.

Q. (Question repeated) "Well, now, will you state the substance of what Mr. Craig said to you and what you said to him when he spoke to you the first time about the letter?" A. Well, I think I told him I read that letter to Commissioner Nixon.

593 Q. What did he say to you? A. I think he asked me what I thought of it, and—

Q. And what did you say? Go right ahead; tell us all that happened. A (continued)—and then—I cannot remember just what I did say, except that I may have said—It seems to me that I said something to the effect that it was a pretty strong letter.

Q. What else was said? A. I do not think very much else was said.

Q. Is that all you can recall that was said on that occasion? A. Well, that is all that I recall now that I did say, on that conversation.

594 Q. And have you repeated everything that Mr. Craig said? A. Why, I think I have.

Q. Nothing more occurred on that occasion, that first occasion? A. I do not believe so.

Q. You told him that you had read the letter and he then asked you what you thought of it and then you told him you thought it was a pretty strong letter. Then nothing else was said? A. I think not.

Q. Where were you when this occurred? A. The conversation?

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Q. Yes; can you fix the place of it? A. It might have been during the morning in the session of the Committee, or it might have been when we went down to lunch.

Q. Now, as a matter of fact, do not you recall that when you went in to the session Mr. Craig was there and had a copy of the letter in his hand?

Mr. Mooney: Are you not misquoting the witness when you say "when you went to the session"?

Mr. Matthews: Yes, he said that.

596

A. No, I do not remember any such thing.

Q. You do not recall that? A. No.

Q. Is it customary for you to attend—was it at that time—to attend the sessions of the Budget Committee? A. Well, I would not attend the full session of the Committee, regularly, but I had—I would go in and out occasionally, just to see more or less what was going on in the Committee and to keep track of what was coming along.

Q. And isn't it a fact, Mr. Kerrigan, that very shortly after you read this letter that Mr. Van Valkenburgh had shown to you, you went in to the 597
session and saw Mr. Craig there and then spoke to him about the letter and he spoke to you about the letter? A. Well, that is possible; that is possible.

Q. After mentioning these things, doesn't it refresh your recollection, and is not that your present belief and present recollection, that that is the sequence of those events on that day? A. I think that is very likely, but I am not positive.

Q. Of course, we can never be absolutely positive about much of anything. A. I mean, I think it is

598 very likely, but I am not positive as to just when it occurred, but I do remember the conversation in that way.

Q. Did any one else participate in the conversation, or stand around and hear it? A. I think not.

Q. You do not recall any other person being present? A. No.

Q. Or any remarks made by any one else present at the time? A. No, sir.

Q. To whom did you give instructions to have the "flimsies" made up? A. Why, I think I gave
599 them to Mr. Van Valkenburgh.

Q. Now, was Mr. Van Valkenburgh in the session that morning? A. Well, I did not see him.

Q. Is he the stenographer that usually reports the proceedings of the Budget Committee? A. No, sir.

Q. At what time in this sequence did you give him those instructions, after you had talked to Mr. Craig on this first occasion, or prior to your talking to Mr. Craig? A. Why, I could not place that—I mean I could not tell you.

Q. You could not tell whether it was before or
600 after? A. No.

Q. What did you do with those copies, flimsies? A. The flimsies—

Mr. Mooney: I think this is a proper time to repeat my objection, so that it does not mean that I am assenting to the course of the examination that the acts of the witness are in no sense binding on the defendant.

The Court: Overruled.

Mr. Mooney: He is neither the servant nor the agent of the defendant.

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A. I gave them to one of the men in the office and told him to deliver them to Mr. Breen in the City Hall—in the City Hall reporters' room.

Q. Mr. Breen? A. Yes, sir.

Q. In the City Hall reporters' room? A. Yes, sir.

By the Court:

Q. Now, what time was that, Mr. Kerrigan? A. That must have been—I think it was about between half past 12 and 1 o'clock in the day.

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Q. Was that before or after you saw Mr. Craig? A. Well, I did see Mr. Craig in the meeting.

Q. I mean before you spoke to Mr. Craig? A. It might have been.

Q. Did you and Mr. Craig leave the Department of Finance together and go out to lunch? A. I think we did.

Q. Now, was this before you went to lunch? A. When I gave this out, yes, sir.

Q. And was it before the meeting of the Finance Committee, or the Budget Committee, was over? A. They were in session when I gave these out.

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Q. Do you remember now whether you caused these so-called flimsies to be delivered before you had the talk you testified about with Mr. Craig, or after, when you had that brief talk? A. It made no impression on my mind; I could not tell you now.

Q. You are not clear? A. No.

By Mr. Matthews:

Q. What is the reporters' room? A. That is room 9, City Hall.

604 Q. Where the City Hall reporters meet and get their information and from which they send their reports in to the newspapers? A. Yes, sir.

Q. Do you recall Mr. Dobson calling you up on that morning? A. Yes, sir.

Q. Do you recall the substance of his conversation with you? A. I do, I think, substantially.

Q. Did you tell him that you would shortly send over, or that there would be at the City Hall, a copy of this letter when he got there? A. I could not say "when he got there," but I certainly re-
605 ferred to the City Hall reporters' room.

Q. As a place where he could get a copy of this letter? A. Yes.

The Court: Had the letter gone over there then when Mr. Dobson called you up?

The Witness: I think not; I think that I told him that I would send it to the City Hall reporters' room.

The Court: You knew Mr. Dobson, of course?

The Witness: Oh, yes.

606 The Court: And knew him to be a reporter on The Evening World?

The Witness: Yes.

Q. Well, you know most of the reporters around City Hall, do you not? A. Some; quite a number of them.

Q. When was the next conversation with Mr. Craig about this matter on that particular day?

Mr. Mooney: I raise the same objection as heretofore. This witness was not acting as the agent or servant of Mr. Craig, but he

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was acting as an independent—as an employee of the Finance Department of the City of New York.

The Court: Overruled.

Mr. Mooney: I except to that.

A. Why, I think it was during the lunch period; it was about half past one to half past two; two o'clock to half past two—something like that.

Q. Where did you see him; did you see him in the office or in the Committee room? A. Why, I think I just went down the street.

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Q. Did you have lunch together? A. Had lunch together.

Q. Where did this conversation take place, at lunch or while you were walking down the street? A. I think I did mention it walking down the street and then about sending it over to Mr. Breen, I think I mentioned that to him; and then either during lunch or after lunch it seems to me it was in some of the evening papers.

Q. You saw it in some of the evening papers while you were out to lunch? A. Yes.

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The Court: That is, the evening papers that come out in the afternoon?

The Witness: Yes.

Q. What time did you return from lunch? A. Oh, along a little after 2 o'clock, probably.

Q. And did you return with Mr. Craig? A. I think I did; yes, sir.

Q. To your office, or did you go to the committee room? A. I went to my office.

Q. Did he go with you ? A. I think he went into the committee room.

610 Q. And you went on into your office. Now, will you state the substance of what you said to Mr. Craig and what he said to you on the second occasion when you discussed this letter?

The Court: That is subject to the same objection.

Mr. Mooney: Yes; I do not quite understand what counsel means by the "second" case.

Mr. Matthews: He testified he talked to
611 him twice about it and he has already given us the substance of the first conversation.

The Court: As I understand it, you are now referring to the conversation that began, as I understood Mr. Kerrigan's testimony, when Mr. Craig and Mr. Kerrigan left the office and started to go to lunch, and whatever took place at lunch?

Mr. Caffey: Yes.

A. As far as I can recall, I related that I had—Mr. Breen had asked me to send the copy or copies
612 of the letter to him personally and that George Dobson had called up to get a copy, and that I had sent the copies over to the City Hall to Breen in order to comply with his request, or something like that. I related the incident of the two men on the same newspaper, calling up for the same thing. That is about all there was to it.

Q. What did Mr. Craig say? A. Well, my recollection is not clear on that, as to what he said, except that there was some question, as far as I remember, about the relations, the positions occupied by Breen and Dobson.

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Q. You mean as to who they were? A. Well, that is, as to who covered City Hall regularly, and did they have anybody covering the Public Service Commission, or was this special or something.

Q. Well, now, you say that both Mr. Breen and Mr. Dobson were reported by you to Mr. Craig as having asked you, both men having asked you for this letter, and you remarked that they were two men from the same paper? A. Yes, sir.

Q. Do you recall when Mr. Breen talked to you about it; did he talk to you personally or over the telephone? A. The first time Mr. Breen talked to me about it, I think, was in the office. 614

The Court: In your office?

The Witness: In my office, when I arrived there late that morning, and he was in my office or out in the corridor, I think, when I came in, or it was soon after I came in, and I had this copy of this letter to Commissioner Nixon on my desk; and I pushed it over to him like that (indicating) and said, "There is some thing; read that"; and I think he wanted it then, but I said I did not want to give it out until I was sure Nixon had it. 615

Q. That was before you first spoke to Mr Craig? A. Yes, that was right after, as far as I recollect; it was right after I arrived.

Q. What time did you get in? A. About 11 o'clock, I think.

Q. And you found that letter on your desk? A. No, I think it was handed to me by the stenographer.

616 Q. And you read it and then shoved it across to Mr. Breen to take a look? A. Not this copy.

The Court: Not this original?

The Witness: Not this original, but a copy.

Q. You had not seen the original at the time when he first came in to the office? A. Oh, yes, it was after I had read the leter.

617 The Court: The original?

The Witness: The original, I believe, of which I showed a copy to Mr. Breen.

Q. I thought you said as you went in you saw Mr. Breen there? A. Well, I say I think he was in the office—either in the corridor or in my room —when I came in, but then I read the letter which the stenographer handed to me. That was almost the first thing I did.

Q. And then you dispatched the original to Mr. Nixon? A. Yes, sir.

Q. Was Mr. Breen present when you did that?
618 A. I do not think he was in the room then.

Q. And then did you have Mr. Breen come in and show him the carbon that you kept? A. Yes, sir.

Q. Mr. Breen did not know anything about the letter, so far as you know, up to that time, did he? A. No, sir.

Q. And you told him that you did not feel free to give him a copy until you were sure it was in the hands of Mr. Nixon? A. Yes, sir.

Q. And you had dispatched it by messenger. It is about a 10 to 15 minute walk from the City Hall to the Public Service Commission—rather, from

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the Municipal Building? A. Well, it may take 10 or 15 minutes.

Q. Well, then, after 10 or 15 minutes had expired, you were ready to give the letter out to the newspapers? A. Yes, sir—that is, I felt ready.

The Court: Mr. Breen was there then?

The Witness: Yes; he wanted some other information, I do not know what it was, and that happened to be there and I showed it to him; that was the first original carbon of this letter.

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The Court: Did you tell Mr. Breen anything about sending copies over to the City Hall reporters?

The Witness: Not at that time.

The Court: But you said you would let him have it as soon as you were satisfied that the original had been delivered to Mr. Nixon?

The Witness: I think I did.

Q. And then you went in shortly after and saw Mr. Craig about it? A. No, I do not think so.

Q. In the meeting of the Budget Committee? A. I might have. 621

Q. And you told him, did not you, that the newspapers would want copies, and you would want instructions as to whether or not to send them over? A. No, sir.

Q. You did not mention that at all to him? A. No, sir.

Q. You are positive of it? Or you just do not recall? A. No, I don't recall any such thing.

Q. You got in about 11; you dispatched this letter; had your talk with Mr. Breen; dispatched the

622 original letter to Mr. Nixon; had your talk with Mr. Breen and then some time during that period had a talk with Mr. Craig about it, probably in the committee room?

Mr. Mooney: That is very involved to me.

Q. And then you had a telephone talk with Mr. Dobson?

Mr. Mooney: I object to that as complex.
623 The Court: Yes; sustained.

Q. Did you talk to any other newspaper men about the letter before you sent it over to City Hall? A. Not that I recall.

Q. I wish you would pay attention to this question and see if I have the events and the order of events correct. You got to your office about 11 o'clock; is that right? A. It might have been after 11; I am not sure.

Q. Then Mr. VanValkenburgh, if you recall, showed you the original, signed copy of Mr. Craig's letter to Mr. Nixon? A. I think that is right.

624 Q. And it was then dispatched by messenger to Mr. Nixon; is that right? A. Yes, sir.

Q. And you were also given by Mr. VanValkenburgh a carbon of the letter? A. Yes, sir.

Q. Mr. Breen came in and you had a conversation with him about it and showed him the carbon? A. Yes, sir.

Q. Then you went over to the Board of Estimate, or Budget Committee room, and talked with Mr. Craig; is that right? A. Well, I did, some time, yes; either before or after.

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Q. Then you gave orders to Mr. VanValkenburgh to make up a set of about 20 flimsies; is that right? A. I am pretty sure I gave that order to him after I read the letter.

Q. You are positive you gave that order at the time you first read that letter? A. No. I know I spoke to him more than once about it.

Q. Then later Mr. VanValkenburgh delivered these flimsies to you? A. Yes, I don't know whether he did or not, but somebody did.

Q. And you received a telephone call from Mr. Dobson about the letter? A. Yes.

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Q. And then you dispatched these by messenger to the City Hall reporters' room? A. Yes, sir.

Q. Then you went to lunch with Mr. Craig and reported to him that Mr. Dobson and Mr. Breen had asked you about this letter? A. I think I related that, or something to that effect.

Q. The substance of your conversation with Mr. Craig at lunch, as I understand it, was that you had talked with these two reporters and had sent flimsies over to the reporters' room? A. To Breen.

Q. To Breen, in the reporters' room? A. Yes, sir.

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Q. Twenty copies? A. Well, I did not mention the number of copies. I doubt if I knew how many copies there were. It is just something that I have all the time.

By the Court:

Q. Your last answer suggests something. Let me have—Mr. Mooney may object to my questions as well as to anybody else's. You say it was something you had all the time. What do you mean by that? A. Why, quite often I get out copies of re-

628 ports, or a memorandum—some statement for the newspaper men—and I tell the stenographer, "Get this out for the City Hall reporters," or something of that kind, and that is about all I have to do.

Q. Well, then, you are now referring to the procedure in the case of matters which refer to public business in the conduct of the office, either reports, letters or other papers that would seem to be of public interest? A. Yes, sir.

Q. As I understand it, you were a reporter yourself? A. Yes, sir.

629 Q. And for how many years? A. Oh, six or eight, maybe ten.

Q. And then you are familiar with the routine and methods of reporting for the daily newspapers? A. Yes, sir.

Q. You were on a large daily yourself, weren't you? A. Yes, sir.

Q. Now, as I gather from your statements, the customary method, or one of the methods of making public any matter deemed to be of interest, is to prepare a number of copies known in the newspaper language as "flimsies," and to cause those to

630 be delivered to whatever set of newspaper reporters are covering that class of news? A. Well, sometimes; sometimes we give it to them when they come in.

Q. Well, either way; but it is done through a number of copies? A. Well, we often do that.

Q. Now, in the office of the Comptroller I assume there are many matters dealing with the public interest? A. Yes, sir.

Q. And which are deemed of sufficient interest to be made public? A. Yes, sir.

Q. And to be published in the newspapers? A. If they see fit.

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Q. I mean so far as you are concerned, to be published in the newspapers if the newspapers will publish them? A. Very often they do not.

Q. But that is not my question; I am not asking you now about the ultimate result. My question now is that your method of acquainting—your method in the Comptroller's office, prior to this time, of acquainting the newspaper men, of giving the news to the newspaper men, was to see that they got copies, either at your office or at the City Hall reporters' room?

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Mr. Mooney: Now, it would be proper for me to make an objection which is a substantial one. That is, that in a proceeding in the nature of a contempt a conviction will not lie upon anything which depends upon custom or a practice, but that the authorities clearly hold that it must be an individual act in fact, or contemptuous utterance, as to the particular matters in inquiry, and that no contempt can, by reason of its very nature, depend upon that which would follow a custom or a course; that the very essence of the contempt is the direct, specific act on the part of the defendant to make a contemptuous reference, and it cannot be made out nor supported by either custom or usage or even knowledge or usage. Therefore I submit that this line is not proper to be pursued further.

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The Court: Overruled.

Mr. Mooney: I except.

The Court: Will you repeat that question?

634 Q. (Question repeated) "But that is not my question; I am asking you now about the ultimate result. My question now is that your method of acquainting—your method in the Comptroller's office, prior to this time, of acquainting the newspaper men, of giving the news to the newsaper men, was to see that they got copies, either at your office or at the City Hall reporters' room? A. Yes, your Honor.

635 Mr. Mooney: If I am not breaking the thought of your Honor—I move to strike out that evidence and I make it upon this ground, and I ask your indulgence only for a moment because I do not want to be lengthy about it, but I want to say now that you, being the trier of the facts in this case, as well as the authority to apply the law, have made a ruling which goes to the root of this proceeding, and I wish it to be known that this is the attitude which the Comptroller takes at the present time. It will not be possible for you to disabuse your mind, if it
636 were abused, to let in this evidence; it will not be possible to disabuse your mind of incompetent evidence of this character, and therefore I say at this time that we have reached a point in which the actual, definite competency of this testimony will be substantially decisive in the case. If it should turn out—and I do not want to make much words about it—if it should turn out that your Honor is wrong on the ruling of evidence, this is not an error which can be cured by your saying, hereafter, of record or otherwise, that you would disregard it, be-

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cause it is not possible for the trier of the facts in a case of this kind to disregard the testimony which is of this character and of the grave consequences that flow from it. I have made these remarks only because I felt that this was an appropriate and proper way to indicate the theory upon which the counsel for the defendant is proceeding, and I thank your Honor for having listened to me.

By the Court:

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Q. Mr. Mooney has referred to your office. Are you appointed by the Comptroller? A. Yes.

Q. That is to say, not from the Civil Service? A. Oh, no; no, sir. Exempt position.

Q. It is an exempt position, and the Comptroller has the power of appointment in his good judgment? A. Yes, sir.

Q. And you were thus appointed? A. Yes, sir.

Q. Now, prior to the 6th day of October, with the knowledge of the Comptroller, did you or did you not have charge of making public for the newspapers, letters, or, as you spoke of it before, reports and memoranda, or other subject-matter?

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Mr. Mooney: I object to that on the ground that it is incompetent and improper, and I assume, your Honor, that in view of what has taken place it will be unnecessary for me to state my grounds further than that. Am I right?

The Court: You are quite right; I overrule it.

Mr. Mooney: I except to that.

640 A. Yes, I had, you might say, charge of it, but I usually furnished to the newspaper men whatever information I could that they wanted.

Q. What I was trying to find out was a matter of fact, whether the furnishing of copies to the newspaper men which the newspaper language calls "flimsies," of matters of information for newspapers, was in your charge to the knowledge of the Comptroller?

Mr. Mooney: Same objection, and, particularly, that it involves a complexity of the
641 duties and the courses and the usages.

The Court: Same ruling:

A. Why, I think generally that is correct.

Q. Just state it in your own way. What do you mean by "Generally that is correct"? A. Why, occasionally the Comptroller at a meeting might give out a copy of the report.

Q. You mean himself? A. Himself, like a meeting of the Board of Estimate, or something of that kind, without its going to me, but ordinarily he
642 leaves all those things to me.

Q. And when you say he left them to you, was that the result of some conversations with the Comptroller earlier in the performance of your duties as secretary? A. Why, I think it just went along that way without any particular—it was just the understanding without any particular conversation or directions.

Q. That is, the understanding between you and the Comptroller? A. Yes, sir.

Q. And so far as you know, was any one else, outside of the Comptroller's office—of course, other than yourself—authorized to give to any news-

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papers the copies of documents which emanated from the Comptroller? A. Why, I think there may have been others.

Q. Do you know of any others? A. Well, things were given out at times that I did not give them out, at times when I was not there.

Q. You mean when you were away? A. Yes.

Q. Let me limit my question to such times as when you were present. I am not talking, of course, of times that you may have been away on vacation, or away for some other reason. I mean when you were present; in other words, to put 644 the matter simply, I am asking you what the routine was at such times when you were present and the Comptroller was present. A. Well, Mr. McGinness, for instance, the Chief Accountant, might, and has given out statement; Mr. McIntyre, the head of the Bureau of Municipal Investigation of Statistics, may issue copies of reports.

Q. Was any one else but yourself in charge of giving out for publicity papers signed by the Comptroller? A. Oh, yes; the Chief Clerk—well, no, he would not be in charge of that; he frequently distributes.

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Q. The question is, was he in charge?

Mr. Mooney: I submit, of course, that your Honor's words "in charge" involve, in itself, a conclusion.

The Court: I will sustain that objection and I will ask the question.

Q. What do you mean by "in charge"?

Mr. Mooney: That is your Honor's term, not his.

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The Court: He just stated that.

Mr. Mooney: Well, he was repeating your Honor.

Q. Well, this was done in accordance with a custom that concerned your own duties which had been engaged in with the knowledge of the Comptroller?

Mr. Mooney: Would it be appropriate for me to renew here and impress upon your
647 Honor my objection that it would be more than merely form, and your Honor understands that?

The Court: I understand it.

Mr. Mooney: I except to the ruling. I do not believe contempt can be proven by custom.

The Court: I understand. Read the question.

Q. (Question repeated) Well, this was done in accordance with a custom that concerned your own
648 duties which had been engaged in with the knowledge of the Comptroller? A. I should say so.

By Mr. Matthews:

Q. Mr. Kerrigan, how long have you been secretary to the Department of Finance? A. Since January 1, 1918.

Q. That is, since Mr. Craig was elected Comptroller? A. Yes.

The Court: You mean took office?

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Q. Yes, took office. You were appointed by Mr. Craig? A. Yes.

Q. What are your general duties? I wish you would briefly describe your general duties as Secretary of the Board of Finance. A. Well, I hope this won't be used in fixing the salary, but, in general, I have charge of all of the internal administration of the department; the ordering of supplies; the appointment of employees—although I do not appoint them, but I recommend them; making up of the budget for the department; the rates of pay received by the employees; the discipline of em- 650
ployees; the matter of communications for the department.

Q. What kind of communications? A. Requests for information and the form of the communications with the Civil Service Commission and with most of the other departments in the City.

Q. Who is your immediate superior? A. My superior is the Comptroller.

Q. And all of your duties are performed under his general supervision and direction? A. Yes; under his general supervision.

Mr. Matthews: That is all. 651

Cross Examination by Mr. Mooney:

Q. Mr. Kerrigan, you are appointed by and pursuant to statute of the State of New York, are you? A. Well, I do not know about that; I never looked that up.

Q. Well, is your appointment in writing? A. Yes, sir.

Q. And signed by the Comptroller? A. Yes, sir.

Q. Is the letterhead that was in use and is now

652 in use, and has been, to your knowledge, ever since you have been with the Department, where the "City of New York" appears at the top (handing paper to witness)? A. Yes.

Mr. Mooney: I offer it.
Mr. Matthews: I object to it right now.
The Court: I will take it.
Marked Defendant's Exhibit D.

Q. By whom is your compensation fixed? A. By
653 the Board of Estimate, by the Board of Aldermen and the budget.

Q. And by whom is your salary paid? A. By the City of New York.

Q. Are you now, or have you been at any time since your appointment as Secretary to the Department of Finance, in the employ of Charles L. Craig? A. No, sir.

Q. You have referred, in answer to some questions in which the word has been suggested to you, rather than used by you personally—that there was a custom in the office with which you are connected. Did you mean in answer to those ques-
654 tions anything more than that there was a course of business? A. You mean the procedure followed, we will say, or the routine followed in getting out, doing business, for instance—that is what I mean.

Q. And his Honor has referred to your familiarity with matters of this kind by the fact that you have been a reporter, so I will take advantage of that strain and follow it up a little bit. Is the system, or course, or custom, as it may have been termed in the direct examination, and the course of business as I presume it in my question, any different with respect to matters going to the public from

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the Comptroller's office than that going to the public from any other of the great departments of the City of New York?

Mr. Matthews: If he knows.

A. Why, not materially different.

Q. And it is a fact, is it, that all the records and papers and books of the public departments in the City of New York are public property to which the public have access? A. So I understand.

Q. And when you say you understand that, you have acted upon that and you have taken that as the law of your position, have you not? A. I have. 656

Q. And that any one coming into your office is entitled to look at your letter book and entitled to look at your copies if they took the position that they are entitled to them? A. I think so; yes, sir.

Q. That is, of course, under reasonable regulations and with reasonable propriety? A. Yes.

Q. I am not talking of a person who comes in very abruptly or unmannerly. You have now given us your understanding of the publicity of the office, have you? A. Yes, sir.

Q. Now, is it not a fact within your experience on both sides of this matter, to which reference has been made, that any communication from one public officer in the City of New York to another public officer in or around the State of New York, with reference to a public matter, is bound to become public within a very short space of time? 657

Mr. Matthews: I object to that on the ground that it is incompetent.

The Court: I will allow it; he may answer it.

658 A. Oh, yes, it becomes public.

Q. In other words, a communication from one office to another on a public matter, such as a traction matter, whether it be given out by the writer or the receiver, or dug out by the reporters, in your experience, that is bound to become public, is it? A. If there is some interest in it, yes.

Q. Well, there certainly was enough interest in this subject, wasn't there? A. Yes, sir, I think so.

Q. There was a compelling interest, wasn't
659 there, at the time? A. There was a very wide interest.

Q. Now, has there not been one step that you have not been questioned about at all, and is not that a telephone call that you had from Mr. Breen? You had seen Mr. Breen. Am I right in assuming that there was a telephone call from Mr. Breen? A. Yes, sir.

Q. Now, will you please tell us about that? A. Why, Mr. Breen called me up and asked me when I gave out this copy of this letter to be sure and send it to him, and I said I would, and he asked
660 to make sure that it was delivered to him personally, and I said I would.

Q. Was there any reference made to Mr. Dobson in that conversation? A. Yes, sir.

Q. What was said about that? A. To the effect that Breen would like to get it delivered to him instead of to Dobson.

Q. Now, you told us in the first place on your direct examination that you had an impression that you had seen the original letter and you started with the word "impression." As time went on the letter was spoken about by all concerned

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as though you had actually seen the letter itself, and that seems to have been assumed from that time on. Now, I wish to get a definite statement from you, in view of your examination, whether it is an impression whch you have or whether it is a fact—what we call an independent act of memory, act of memory; that you think or believe or recall having seen the letter? A. Well, that is all I can say. I do not recall it as an independent act of memory, if I get your meaning—that is, as I would remember getting married, if I were married, or something of that kind. I do not remember that letter. 662

Q. Well, now, let me make clear to you, for the purpose of my question, the fact that you are entitled to an aid to your memory, and when we say an independent act of memory we still mean an independent act, fortified, supplemented, or reminded by seeing the paper and the signature. Now, I want to know whether, with that paper to prompt or aid your recollection, whether you now have an independent act of memory, or whether it is only an impression, as it started? A. Well, the best of my recollection is that I saw 663 that letter and had it sent up to Mr. Nixon by the messenger.

Q. Well, the next thing that came along was the question of having seen the Comptroller. As I understand it, you got in there after the committee had started its session? A. Yes, sir.

Q. And on this particular day the Committee, which included the Mayor and a number of public officials, was holding its session in a large room of the Comptroller's office which adjoins his smaller

664 and more private office; is that it? A. Yes, what they call a hearing room.

Q. Now, did you have any object or purpose in going into the session, as it has been termed here, and paying your respects to the Comptroller and letting him know that you were there on that morning; have you any recollection? A. No recollection of any object for going in there at all that morning.

Q. According to your knowledge and experience, is not it a fact that that day was one of the heavi-
665 est days for this budget committee work in the history of the City of New York, so far as you know it, in your experience? A. Yes, it was rather unusual, I think, because they began early in the morning and they were at it all day.

Q. And when we have talked here of the end of the session being some time after one o'clock, we are only speaking of the morning session, aren't we? A. That is all.

Q. And if I am correctly informed, the evening session went past 6:40; that seems to be sure? A. Yes, sir.

666 Q. Are you in a position to say that you remained there until 6:40, or it finished before you went away? A. Why, no. I think I remained there until the meeting was over, but I am not certain as to that. That is not impossible; I mean there is nothing to impress me one way or the other.

Q. I am not suggesting to you that 6:40 was the end of the meeting. I am suggesting that to you only as an hour to which you will assume that the meeting at least extended. Now, were you at the Comptroller's office up to 6:40 on that night? A. I could not say the hour, but I think so.

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Q. Was this the budget for the City of New York upon which they were engaged that day? A. Yes, sir.

Q. Now, if I understand your direct testimony correctly, you have no independent recollection of having any conversation with the Comptroller on the subject of this letter other than that you spoke to him on an occasion either at lunch or before lunch; am I right in that respect? A. Well, I say I might have spoken to him when I said I read the letter to Commissioner Nixon; that may have occurred before lunch or at lunch.

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Q. But as you started to give us your recollection you started with the luncheon conversation, didn't you? A. Yes, I think possibly I did.

Q. Without fixing it definitely as taking place at luncheon, it was the the conversation at luncheon or a conversation at luncheon that was chiefly in your mind, was it, when you gave your testimony in the first instance? A. Yes, sir.

Q. And unless it had been suggested here to you in the form of questions, had you any independent recollection at all of having any conversation with Comptroller Craig by walking into the session? A. What do you mean?

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Q. (Question repeated) And unless it had been suggested here to you in the form of questions, had you any independent recollection at all of having any conversation with Comptroller Craig by walking into the session? A. No, sir.

Q. Do you remember a single thing, as an independent act of memory, not that it may have been one part of the day or it may have been another, as you sit on the stand there now, haven't you got an independent recollection of having said anything to the Comptroller other than to pass the

670 time of day, or to pay your respects when you walked into the session? A. I may have spoken to him.

Q. That is what I am after. In other words, if you had given him your own version of the events of that day, do you say that you have any recollection or anything that really amounts to any recollection of any incident prior to luncheon on that day? A. No, sir; not at that time.

Q. And these things that you have been answering here, as you have been politely but firmly
671 crowded from point to point, they are the mere efforts to keep up with the possibilities that you may have had a conversation—that you may have had or may not. Is that a correct description of it? A. Why, at any particular time; yes, sir.

Q. Was Mr. Craig, so far as you observed, by the proximity of your own room and your desk in the hearing room, was he in continuous session from the time that you arrived on that date up to the time that the Committee adjourned for luncheon; I mean, was he physically and corporeally in the room where the meeting was being held, so far
672 as you could observe? A. Yes, sir; he was chairman of the committee.

Q. Now, is it a fact, after having gone over the matter, so far as the question have developed here, that you gave out these flimsies before you talked with Mr. Craig upon the subject of the letter; is that the fact? A. I think it is.

Q. And by saying you think it is, that is the best of your recollection? A. Yes, sir.

Q. And is it the fact that any communication going out of the Comptroller's office, when sent out in the regular and usual course of business, that the copy of the communication does lie open

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on the desk, so that it may be seen and observed by any one being in the office upon business, after they have passed two strong-armed officials in the outer room? A. Why, yes, sir; they lie right on top. They may lie in a basket or on the desk in which they are filed away; something of that kind.

Q. Something has been said to you as to what is customary, and so forth. Do you know of any right or privilege that you would have as Secretary of the Finance Department to withhold such a communication as this from publication? A. No, sir. 674
If requested, you mean?

Q. Yes; if requested by a taxpayer for a decent and orderly purpose? A. No, sir.

Q. The word "understanding" was used here. I am not entirely clear whether it was used by you or used by the questioner, whether by the Court or counsel on the other side. I want to direct your attention to what we observe of that in its colloquial or common significance, as distinguished from its real or generic significance. Did you ever have any word of mouth agreement, direction, instruction, or any thing in the nature 675
of an order or direction, on the subject of giving out any matter for publication in that office from the Comptroller? ? A. You have a long lot of words in there.

Q. Well, Mr. Kerrigan, have you done anything more in that office with respect to the passing out of the stuff for the newspapers, and in passing out this letter particularly? Did you do anything different than has been done, from your own knowledge, in the City of New York, with respect to the City Departments from time immemorial? A. No, sir.

676 Q. Did you ever have any word with the Comptroller on the subject of what you should or should not give out in the way of giving news out to the newspapers? A. Why, that was usually left to me.

Q. And by being left to you you mean that you did it? A. I did it; yes.

Q. Now, this seems to be a matter of considerable importance in this case, the shadings of words. Now even the words "left to me"; do you mean by that that you did it on your own mind and your own heart, or do you mean that somebody
677 told you to do it, directly or indirectly? A. No, sir, that was whatever in my judgment I thought should go out in the nature of a report or a letter or anything of that kind; I was at full liberty to use my own judgment and put it out.

Q. In other words, you regarded that as the business of the Secretary of the Department of Finance of the City of New York? A. Yes, sir.

Q. Now, this is not a case of modesty. This is not a case of bowing the knee to any one. I ask you whether, in the course of your business as Secretary of the Department of Finance, whether
678 you were under Mr. Craig or whether you were not, it was in your power, jurisdiction and course of business to give out for publication what you wanted to? A. Yes, sir.

Q. Did you need to have any understanding with anybody? A. No, sir.

Q. Did you need to have any directions? A. No, sir.

Q. And did you, in this instance, act entirely upon your own responsibility in doing what you did? A. Yes, sir, I did.

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Q. And when you did it, did you know that if you did not do it somebody else would do it; that is to say, if they did not get it from your end of the line, they would get it when it was read from the other end of the line? A. I only did it as a matter of convenience.

Q. Now, it is not entirely clear to my mind, from the course of your examination, whether these reporters were emphasizing the question of time with you and time only, when asking for the copies of the letter. Will you please make that clear? What did the reporters say to you upon the ques- 680
tion of timeliness in getting the letter, if they did so? A. Well, when Dobson called up he wanted it right away. He wanted to know if he could get it right away, and with Breen, it was just a matter of speed—getting it over to him just as soon as I could.

Q. And you, as a reporter, or an ex-reporter, you knew that well, did not you, that it was a question of speed? A. Yes, sir.

Q. Or where they would get it first; is that it? A. Well, not altogether where they could get it first but how they could get it first.

Q. And also to get an accurate copy? A. Yes, 681
sir.

Q. Now, besides being a reporter what other positions have you filed, in connection with newspaper work? A. Well, I have been in the business office of a newspaper, the circulation office.

Q. What newspaper? A. The Brooklyn Daily Eagle.

Q. And prior to your appointment to your present position were you the Secretary of the Department of Efficiency & Economy? A. In the State, at one time; yes, sir.

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Q. And what other positions have you held? Does that comprise your employments now for some years past? A. No; I was Supervising Examiner in the State Comptroller's office under Comptroller Travis for some time, and after that I was editor of the Bureau of Municipal Research until my appointment as Secretary to the Department of Finance.

Re-direct Examination by Mr. Matthews:

Q. Do you intend by your questions on cross
683 examination to change the substance of your testimony on direct examination?

The Court: You mean "answers"; you said "questions."

Q. By your answers do you intend to change the substance of your direct examination? A. Well, just clear it up if there are any questions.

Q. Were your answers to my questions respecting the two occasions on which you talked to Mr. Craig about the Nixon letter, the statement of your best
684 recollection of those two occasions? A. Well, there might have been two occasions or one occasion; I thought I made that clear enough.

Q. I do not think so. My recollection was that you yourself had suggested that there was more than one occasion when I asked you about that. A. You asked me that and I said it was quite possible that there had been more than one occasion but I could not specify.

Q. Is your best recollection now that there was only one occasion, or that there were two occasions? A. Well, I do not know just how to answer that.

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Q. I want your best recollection. A. Well, I have a distinct recollection of one occasion. The other is not—I mean as to whether it was at a different time or at the same time. I have a distinct recollection of saying that the letter was pretty strong, or something to that effect; also of telling about Mr. Dobson and Mr. Breen, and so on, and whether that all occurred at one time or whether it occurred at two separate intervals, I could not say, because, when I came in—I know this—when I came in that morning the Committee was in session and ordinarily I might go into the Committee room and I might 686
not; sometimes there is a whole session, practically, that I do not attend. They were having open sessions and closed sessions. I never go into the closed sessions, so that I could not tell; I mean it made no particular impression on my mind whether I went into the committee room and said, "How do you do," or whether I looked in the door and see they were very busy or what.

Q. But it was not your custom, then, to go in and pay your respects to Mr. Craig every morning just to let him know you were there on the job? A. Well, he was usually looking for me, sometimes be- 687
fore I got there; so usually I looked in and let him know that I was there. That is about all there is to it.

Q. You said to Mr. Mooney that you were at full liberty to put out various items of publicity. Had that been a matter of discussion between you and Mr. Craig or had it grown up as a matter of practice at the time you took office? A. Well, yes, it was there before I went into office. Matters of record which the newspaper men called for were given

688 to them, if it was possible. Matters of opinion, or an interview, or a question from a man as to his opinion, or something like that, of course, that depends somewhat on the time and question, and how much you have to do and various other things; but if they call for a copy of any document or paper or record, why, they have access to them, and the newspaper men first of all.

Q. You refer now to routine records and statistics and things of that kind at the Comptrollers office? A. Anything; any of the papers there
689 throughout his department.

Q. Official records of the department? A. Yes.

Q. You spoke of your lack of knowledge of any right to withhold certain information. Did you ever investigate that matter, or is it merely a statement of your present recollection, without any reflection of it? A. I don't know what you refer to.

Q. Mr. Mooney asked you, if a taxpayer should come in there and ask you for any information, whether you knew of any right to withhold the information from him? A. Oh, that—I have heard that a great many times, both as a reporter and as
690 an official.

Mr. Mooney: I might say it is a matter of statute.

The Witness: As a matter of fact, if people come in and ask for papers, they get them—even the Citizens' Union.

Q. Do you recall seeing Mr. Craig later in the afternoon of that day? A. Yes, sir.

Q. How many times? A. Well, a good part of

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the afternoon. I was in at the hearing that they gave to the charitable institutions.

Q. On that day? A. On that day.

Q. Do you recall what was taking place at the morning session? A. I do not know.

Q. Can you recall how long you were in there? A. Why, as I say, I could not have been in there very long, and I do not know what they did, what they had on that morning.

Q. Who keeps the records of the meetings of the Budget Committee? A. Why, they have a stenographer who takes the minutes of the record from the 692
Board of Estimate, from the Staff of the Board of Estimate.

Q. Does he write up his notes, and is a formal record made and filed of those proceedings? A. Yes.

Q. Where is that kept? A. That is kept in the office of the Secretary of the Board and copies are given to the members of the Board.

Q. Who is the Secretary of the Board? A. The Secretary of the Board of Estimate is Joseph Haag.

Q. Was he the secretary on October 6, 1919? A. 693
Yes, sir.

Q. And is his office in the Municipal Building? A. Yes, sir.

Mr. Matthews: That is all.

Mr. Mooney: That is all.

694

ELSWORTH L. TIMBERMAN, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Timberman, where were you employed last September? A. In the office of the Receiver of the New York Railways, Mr. Job H. Hedges.

Q. In what capacity? A. As stenographer.

Q. Under whom did you work directly? A. Mr.

695 Anderson.

Q. Mr. Anderson, Mr. Hedges' secretary? A. Yes, sir.

Q. Do you recall on September 8th, doing a particular job for Mr. Anderson? A. I do.

Q. Do you recall the details of it now? A. Yes, sir.

Q. I wish you would state what Mr. Anderson asked you to do and what you did.

Mr. Mooney: I object to that, your Honor, as to what took place on September

696 8th, as utterly not connected with the defendant. It is not conceivable as to how it could be connected.

The Court: I will allow him to state what he did. What did you do, Mr. Timberman?

The Witness: On the morning of September 8th, when I arrived in the office, Mr. Anderson handed me a list and asked me to address envelopes to the names on the list. I did this and handed the envelopes back to Mr. Anderson.

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Q. Is this the list which I now show you (handing document to witness)? A. It is.

Q. And did you hand this back to Mr. Anderson, also? A. I did.

Mr. Matthews: I ask that it be marked for identification.

Marked Government's Exhibit 5 for Identification.

Q. I notice a pencil check on the face of this paper. Did you make that check? A. I did, after I had completed the envelopes. 698

Q. Did you see the envelopes after you had handed them back to Mr. Anderson? A. No, sir.

Q. Did you have any other duties in connection with those envelopes; did you do any thing else with those envelopes? A. Not with those particular envelopes, no, sir.

Q. Did you address more than one set of envelopes from this list? A. No, sir; one set.

Q. Did you see what Mr. Anderson did with the envelopes which you handed to him? A. No, sir, I did not.

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Mr. Matthews: I think that is all.

Mr. Mooney: Well, so as to save recalling him, perhaps you had better show me the exhibit for identification.

Mr. Matthews: It is merely one step in the Government's chain of proof that a memorandum of the court of about September 6th was mailed to Mr. Craig.

Mr. Mooney: There is no cross examination.

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WILLIAM J. DALY, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Day, last October, on the 6th, what was your employment, you business? A. I was a reporter for the New York City News Association.

Q. What was your assignment on the sixth day of October, if you recall? A. I had the so-called
701 traction hearing at the Public Service Commission, 49 Lafayette Street, to cover.

Q. Were you present at the conference there? A. Until I was asked to leave, yes, sir.

Q. Was the letter from Comptroller Craig to Mr. Nixon read during the time you were present? A. No, sir.

Q. Did you later see a copy of that letter on that day? A. I later saw a copy of the letter addressed to Mr. Nixon with the name of Charles L. Craig at the end of it.

Q. Did you call on the Comptroller's office on
702 that day? A. Yes, sir.

Q. About what time? A. Oh, I should judge around 12:30, maybe it was a little earlier; it was in the neighborhood of between noon and 12:30.

Q. Did you inquire there for the letter? A. Yes, sir; I inquired of an attendant, the man at the door, who resembles a retired policeman; I don't know his name. He is there every day.

Q. Did he supply you with a copy of it? A. He did not, no, sir.

Q. Did he indicate where you could get a copy? A. He did, yes, sir.

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Q. Where?

Mr. Mooney: I object to that.
The Court: Sustained.

Q. Where did you go from there? A. Room 9, City Hall.

Q. Did you find a copy there? A. I found what we call "flimsy" there on the desk, I took a copy.

Q. What was that flimsy? A. It was typewritten matter addressed to Lewis Nixon, Public Service Commissioner.

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Q. I show you Government Exhibit 2. Will you glance at that and see whether or not that—state whether or not that flimsy was a substantial copy of that exhibit? A. It looks like it. I haven't read it all now, but it resembles the flimsy which I took there on the desk.

The Court: The copy of the flimsy resembles this original?
The Witness: Yes, sir; I see one or two words here that I recognize.

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Q. Did you take one of the flimsy copies? A. Yes; I took what we call a complete set; I think there were two to make up the full letter.

Q. You mean two pages, two sheets? A. Yes, sir.

Q. What did you do with them? A. I put them in my pocket and ran to the office of the New York City News Assocation, 30 Church Street. The reason I say I ran, it rained like the mischief then.

Q. And then what did you do? A. And I sat down to a typewriter and I proceeded to write—I don't remember what I did write—I wrote some

706 thing about that letter, and pasted up the letter in short takes, as we call it.

The Court: Short takes?

The Witness: Short takes, yes, sir.

Q. You mean you copied the flimsy? A. No, sir, I used the flimsy and stripped it with the scissors.

Q. You mean you added your comments? A. Oh, no; City News men never make any comments.

Q. You mean you cut the flimsy up and turned
707 it in in that shape? A. As is.

Q. At that time what character of service was the City News Association rendering? A. News service.

Q. To whom? A. Twenty-two newspapers, including the Associated Press.

Q. Where is the City News Association located? A. Room 521, 30 Church Street, New York City.

Q. That is in this County, in this borough, this district? A. Yes, sir.

Q. Can you state which of the New York City newspapers have the City News service? A. Oh, yes; you mean now?

708 Q. No, at that time? A. Oh, all except the Evening Sun and except the New York Call and except the—well, I could go on with numerous exceptions.

Q. Well, let us see, The Times? A. Yes.

Q. The American? A. Yes.

Q. The Journal? A. Yes.

Q. The Morning Sun? A. Yes.

Q. The Herald? A. Sun and Herald at that time, I think; I don't know when the consolidation came about.

709

Q. But the Herald had it before the consolidation? A. Yes.

Q. And they together had it afterwards? A. Yes, I understand so.

Q. And the Evening World? A. Yes.

Q. The Morning World? A. Yes, sir.

Q. Telegram? A. Yes, sir.

Q. The Evening Post? A. Yes, sir.

Q. The Evening Mail? A. Yes, sir.

Q. The Globe and Commercial Advertiser? A. The Globe.

Q. The Tribune? A. Yes, the Times and the 710
Morning Telegraph and The Brooklyn Daily Eagle, and the Associated Press at 51 Chambers Street, and one or two of the German papers, I don't know which ones they are.

Q. In what way is the City News Association service rendered? A. You mean what mechanical physical way?

Q. Yes? A. They have what is known as a typewriter ticker service, like the Wall Street News Bureau, that style; not the ticker tape, but the typewritten sheet formation.

Q. I show you some sheets and ask you whether 711
this is a sample of the service that comes out at the end of the subscriber (showing papers to witness)? A. Yes, sir, and the City News also has a delivery service. They deliver manifold copies by messenger boys, but the quick service is over this telegraph system.

Q. Telegraph ticker? A. Telegraph ticker, yes, sir, from a monitor or master machine in the office, the copy is reproduced simultaneously at the ends of the telegraph wires in the newspaper offices.

Q. Can you state whether or not your article on

712 that day was sent out over the service? A. Of my own knowledge?

Q. Yes? A. No, I don't know. Once it leaves my hands it goes to the copy desk and sometimes the copy don't go out.

Q. You turn it in to the copy desk and that is as far as you know? A. Yes, sir, and as far as we can help ourselves. Then it is up to the copy desk after that whether it goes out or not.

Q. Are you able to identify the sheets you have in your hand? A. Yes, sir, I see my initials on
713 them.

Q. What are those sheets, what do they represent? A. They are what we call takes of a story or a copy under the caption of "Public Service," meaning that it is a copy which emanates from the Public Service Commission's business, and the subcaption is "Traction Conference."

Q. Can you show me the portions of this, if it is included here, which relates to the letter about which I have questioned you? A. Yes, take number 6 here; start off with "Traction Conference", the letter, I presume the letter you have in mind,
714 "The letter is as follows:" and then begins, "The Honorable Lewis Nixon" and so on, and that takes in all of take six, all of take number seven concludes with take number eight.

Q. From that can you tell what time it was turned in by you to the office? A. No, sir, not the time it was turned in, but from it, I can tell what time the operator transmitted it on the machine.

Q. Wha time was that? A. The time on take number six was 1:20 P. M.; take number seven went out, that is, the conclusion of it, was 1:27, and take number eight was finished, the operator finished sending it out at 1:47 P. M.

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Mr. Matthews: I offer in evidence takes numbers six, seven and eight to which the witness has referred.

Mr. Mooney: I object to that as incompetent and not connected.

The Court: Overruled.

By the Court:

Q. Let me ask you, more out of curiosity than anything else—at the bottom, for instance, on the first page, ready I think you said, it was 1:20, now, in the ordinary process of this kind, does 716 that appear on tickers at or about that time? A. Simultaneously.

Q. Then, that is to say, any given article proceeds as it is transmitted? A. The time is the end of the articles and not the beginning of it.

Q. Yes, at the bottom? A. Yes, sir.

Q. But I mean to say if I were reading an article—I just want to get the process in my mind—at the end of the first page I would have read that presumably at 1:20, if I were reading the article? A. Yes, sir.

Q. And then I would read the next at 1:27 and 717 the last at 1:47, if those are the correct articles? A. Yes.

Mr. Mooney: That is, if you were in the newspaper office?

The Court: In the newspaper office?

The Witness: Yes, your Honor.

Marked Government's Exhibit 6.

Cross Examination by Mr. Mooney:

Q. Now, this 1:20, that is take number 6, isn't it? A. Yes, sir.

718 Q. Now, what was the hour of take number 1? A. Let me look at the copy, I will tell you.

Mr. Matthews: Take number 1 will not refer to it.

The Witness: Take number 1 is not here.

Q. Have you got something to carry us back to take number 1?

Mr. Matthews: I have some other ma-
719 terial here, but I don't think it has anything to do with these particular matters.

The Court: Suppose you let Mr. Mooney see them?

Q. I can probably get at it in another way. If take number 6 was at 1:20, and then came another at 1:27, and the next one at 47 minutes, making 1:20, 1:27 and 1:47, it is quite plain that take number 1 was quite some time before 1:20, isn't it? A. No. sir, there is no regulation by which you can calculate that. Take number 1 might have been 7 o'clock that morning.

720 Q. Well, you have really answered the question quite as I want you to; in other words, it is quite apparent that take number 1 was at least some time before take number 6?

Mr. Matthews: I have those takes here, but they don't refer to the letter.

Q. I want to find out when he got his story? A. I began to get my story when the conference opened.

Q. And when did you commence to run? A.

721

Well, I was running all day, because it rained, and I ran from the Public Service Commission to the Comptroller and from the Comptroller to the City Hall and I ran from the City Hall to my office, and I was wet. It rained horribly.

Q. Now, you tell me when your takes came along? A. Which one?

Q. When they put you out? A. My first take is dated 12:07. That take deals with the opening of the conference and representatives who were there, and so on. Take number 2 is dated, time 12:16, and gives a little more news about the con- 722
ference. Take number 3 is dated 12:13 and that contains the reference or the subject of the exit of the newspaper men.

Q. Now, just let me read you at that stage from the stenographer's minutes that have been put in evidence here in printed form, and let me ask you if you were present, if this is what happened, in substance. Construction Commissioner Delaney said: "Well, I want to do my duty as a representative of the People of New York, but I don't want any newspaper headlines about what I say. That is why I protest against this open form of confer- 723
ence. Commissioner Nixon: My intention originally had been to have it as a closed conference. I will ask the representatives of the press to withdraw, please, and all those who do not represent companies will please withdraw. Various spectators and newspaper men left the room." That is what happened and that is what you were reporting in substance in that take, is it? A. I will read to you what I reported in this take.

Q. All right, we can read that ourselves when we get to it. I am not wanting to interfere with

724 the Government's suit. I am only keeping your mind down to certain things. Is what I have read the fact? Excuse me, you are a newspaper man and I am a lawyer, so I know just exactly what is in your mind. Now, is it a fact before you wrote on that paper that what I read you from the book took place, as a matter of fact, or would you like me to read it? A. What you read happened.

Q. And when that happened you made up your mind you were going to get the rest of the conference, if you could? A. Sure.

725 Q. When anybody tries to put a newspaper man out of a conference— A. They come down the chimney.

Q. And you had no more doubt then and you have no more doubt now but what took place at that conference was coming out of the newspapers just as quick as it could be gotten? A. I thought we would win out eventually, yes.

Q. And you realized that if there was a communication read from the Comptroller at that meeting, if you did not get it there, you would get it at the Comptroller's, didn't you? A. Yes, sir.

726 Q. And you never had difficulty in getting communications from the Comptroller's office in public matters, had you? A. No.

Q. In other words, there is no public officer that you ever ran up against yet who is sufficiently strong to hold to the idea that he will keep back something that affects the public from the public press? A. He might keep it back for awhile.

Q. But in the course of a very little time out it will come? A. In some form or another, yes.

Q. Now, we'll proceed with your takes, which are very important to me. Let us take the next one,

727

your next take on that day? A. You mean the time, sir?

Q. Yes, please? A. The time on number 4 is 12:12.

Q. What was the general subject of number 4? A. Number 4 tells about Col. Timothy S. Williams, former president of the B. R. T., appeared as an individual; it tells about John Underwood, president of the Queens County Railway, and it tells about Mr. Stimson being there.

Q. In other words, this is about the style up to the time you were excluded; you were writing as 728
it developed, and then from the time you were excluded you had to write the incidents as they had already passed, is that the idea? A. Repeat that, please.

Q. Up to the time that you were excluded, and put that on your take, you were writing straight —ahead stuff, you were getting the story out just as quick as you could? A. As it happened.

Q. But from the time that you were excluded, because you were excluded, then you had to go back and fill in your story in the next takes, isn't that so? A. What do you mean by filling it in? 729

Q. Well, I am not using newspaper expressions, because I have forgotten, but you could no longer write straight-ahead because you had been excluded? A. In sequence, you mean?

Q. In sequence, that is right; then you had to write the rest of the story? A. As we picked it up, regardless of when it happened.

Q. And as a matter of fact you did pick up almost immediately that there had been a hot letter read from the Comptroller, that was the newspaper men's expression, was it, you heard it at that

730 conference? A. It was a wet letter; it was wet from the letter press copy.

Q. And how quick did you see it? A. I saw Mr. Gleason with a letter which was wet, and he went in and gave it to, as he said, the boss, meaning Commissioner Nixon, and when he same out, I said, "Say, what was in the letter?" And he said, "That will have to come from the boss," or something to that effect; and shortly after the advent of the letter, the conference was over, and it occurred to my mind—if I may tell you what oc-

731 curred to my mind—

Q. Certainly, I am cross-examining you. You may not know it, but I really am? A. It occurred to my mind that whatever was in that letter might have broke up that meeting, and I decided to wait for the letter; and I hung around, as we say, and Mr. Gleason said, "No, you cannot have a copy of the letter." I said, "I am going to see your boss." When the coference was over, I went in to Commissioner Nixon and I asked him for a copy of the letter and he said I could not have it. My recollection is that he said it was from Comptroller Craig

732 —yes, from Comptroller Craig, and I did the next best thing.

Q. And what was that? A. Went down to Mr. Craig's office.

Q. You saw stenographers at work there, of course, as usual, in the room there that morning? A. In the conference room?

Q. Yes? A. Yes, I think so.

Q. Now, can you tell us, please, about what time of the day it was when the newspaper men were excluded? A. That would be guessing, Mr. Mooney; I think it was around 11:30.

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Q. Well, the stenographic minutes showed that the conference commenced at 10:40. It was called for 10:30 and it commenced at 10:40; and they have exactly 23½ printed pages of matter there, part of which are these letters. Does that help you to fix the time at all? A. 10:40?

Q. Yes? A. I think that about makes me right; I think about 11:30 we were asked to withdraw.

Q. Now, as I understand your story of the letter, which you observed and which is now in evidence, you could tell it by your eyesight that it had just come out of the letter press function; you could 734 tell it was wet? A. It was wet, Mr. Mooney.

Q. About how far away were you from it? A. Oh, I stood right next to Mr. Gleason.

Q. Now, you are able to tell us something which only appears by inference from the other witnesses, and that is, the actual fact that Mr. Nixon did not have the letter when the conference commenced; that he received it before he asked the newspaper men to get out of the room, and that if he read it, as now seems plain, that he read it after you had gotten out of the room. Those are the facts as you know them to have taken place? A. Yes, sir. 735

Q. Can you tell us about the hour? I think you have been asked about it already, but you saw this come into Mr. Gleason's hand and him passing it up to the Commissioner. A. No, I did not see him pass it up to the Commissioner. He went up to a little flight of stairs, into a door which led to a rostrum or desk where the Commissioner sat.

Q. Now, it is quite plain, is it not, that that conference was, in your opinion as a newspaper man, and engaged in the particular branch that you were engaged in, the fact that it was a conference touch

736 ing upon the traction situation, and that it was a place to which public officers had been invited, that it was a matter of very strong public interest, wasn't it? A. I thought so.

Q. And it was only a question of how quick and how definite you could get the news out? A. Yes, sir.

Q. Now, have you finished the takes there? A. I finished them, Mr. Mooney, as far as I handled the story.

Q. Is it the number 5 there, have you got number
737 5 there? A. Yes, sir.

Q. Will you just give us number 5? A. Number 5 was 1:16; is that all you wanted, the time?

Q. Yes; now we have all. Will you tell us, please, now, what time your matter has to go over the wire to be in time for the afternoon edition of the papers? A. That depends upon when the final edition of the afternoon papers is printed.

Q. In other words, it works backwardly, doesn't it, so that your time of getting the material in for publication depends upon the number of editions and the hours at which those editions come out?
738 A. Yes, sir.

Q. Well, now, so as to shorten my examination as far as I can, and without putting one newspaper ahead of another, will you tell us what the ordinary hour is for real news, afternoon newspaper, for you to get your stuff in? A. The City News recognizes no ordinary hour. The City News is open from 7 in the morning until 3 the following morning and every hour is the same as any other hour with the City News, because they supply morning and evening papers.

Q. Perhaps you can answer the question which

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I really have in mind, although perhaps I am not phrasing it correctly. It is as follows: What is the latest that you can get your stuff over the wire for publication in the afternoon papers in New York? A. In summer or winter?

Q. Well, at this time, October?

The Court: October 6th, at that time?

A. Well, that, Mr. Mooney, depends upon the character of the news and, God forbid, but if some one shot President Wilson, the papers would keep open till 7 o'clock, perhaps, or 6 o'clock, or would, what we call, make over.

740

The Court: He means normally.

Q. I will take a specific instance. Let me take this specific instance—your take number 6 which went over the wire at 1:20, will you please tell us what issue that would normally go into? A. Different newspapers have different edition times, and I would have to be familiar with the edition times of them to answer your question, but that time of day should reach every evening newspaper.

Q. Up to half past one a man has got a pretty good chance? A. Oh, up to 4 o'clock.

741

Q. Now, one of your takes refers to the order of Judge Mayer? A. That is not mine, Mr. Mooney.

Q. It is not? A. No, sir; the City News Association has a man in this building, and if you look on that you will see his initials on there.

Q. Did you personally hear of the order of Judge Mayer on that day? A. No, sir, not till I read the evening paper going home on the subway that night.

Mr. Matthews: I offer in evidence the takes to which Mr. Mooney referred.

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Mr. Mooney: I would be more happy with respect to your offer if you told me why you offer them now and not before?

Mr. Matthews: My only theory of it is this, and I want the record to be complete on the examination of this witness—your questions with respect to the takes and his answers as he gave them to you, will not be complete in the record without the exhibits themselves.

Mr. Mooney: What I would like to do under these circumstances is to let the actual marking of these papers be reserved, say, until the next session, and in the meantime I will look them over.

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The Court: The Clerk will mark them for identification.

By Mr. Matthews:

Q. I think he referred to, and included, take 5; is that correct? A. I would have to look at them to answer it.

Q. 1 to 5 inclusive, is that right? A. Yes, sir, and includes the letter.

744

Mr. Matthews: The letter was included in another offer, 6, 7 and 8.

Marked Government's Exhibit 7, for identification.

Re-direct Examination by Mr. Matthews:

Q. You were asked by Mr. Mooney concerning the heading on the takes, "Public Service." As I understand it, takes 1 to 5 inclusive relate to infor-

745

mation secured by you at the office of the Public Service Commission? A. Yes, sir.

Q. And takes 6, 7 and 8, that is, Government Exhibit 6, included only the letter which you procured, the flimsy which you procured at the City Hall, room 9?

Mr. Mooney: I am obliged to tell you, if you press your question that way, Mr. Matthews, it is an hiatus, because between those two there was matter which he wrote up in takes 4 and 5. I just throw the suggestion out in the hope of clarifying the situation. If you divide the question, perhaps you will cover it.

746

Q. Where did you get all the information contained in pages 6, 7 and 8? A. Where did I get it?

Q. Yes? A. Off the desk in City Hall.

Q. That includes only the Comptroller's letter so far? A. Yes, sir, but there may be a Public Service slug on the top of that, is there?

Q. Yes? A. Well, that means that it is a Public Service story.

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Q. What is the purpose of that? A. To give it identity when it comes over the ticker so that papers won't be floundering around with a multitude of things. They will know this is a Public Service subject or topic.

Q. But that does not mean that it came from the Public Service Commissioner's office? A. No, sir.

The Court: It relates to the subject rather than the place?

The Witness: Exactly, yes, sir.

748

JAMES ENGLANDER, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Englander, on October 6th last, were you connected with The Tribune as a reporter? A. Yes.

Q. Did you write a story on the so-called Craig-Nixon letter for your paper? A. Yes, sir, I did.

Q. What was the source of your information for
749 that story? A. Why, I got the City News copy in my office; I used that mainly for that.

Q. Have you previously produced the copy of the Tribune for October 7th, 1919, in which that story appeared (handing paper to witness)? A. What do you mean by "previously produced"?

The Court: He means before to-day.

The Witness: I don't believe I have.

Q. Well, is that a copy of the paper? A. That appears to be, yes.

Q. And does it contain the story that you wrote
750 concerning the Craig letter? A. It does, yes.

Q. You say you got your information as to the text of your letter from the City News? A. From the City News, yes.

Q. Is The Tribune a newspaper of daily and general circulation in this City and County and State? A. Yes.

Q. Was it at that time? A. Yes.

Mr. Matthews: I offer in evidence the copy of The Tribune identified by the witness.

The Court: Overruled.

751

By the Court:

Q. You say you got it from the copy of the City News? Was that copy delivered to you? A. No, it came over the machine.

Q. You got it from the so-called ticker over the machine? A. Yes, sir.

Q. And do you remember what hour you got it? A. Why, some of it was, I believe, already coming over the ticker at that time and I waited until the letter was complete.

Q. Were you at the Tribune office? A. I was at 752
the office.

Cross Examination by Mr. Mooney:

Q. Mr. Englander, you relied, in part, upon the City News, but not entirely, did you? A. No, just for the text of the letter.

Q. For instance, this article referred to the fact of the issuance of the order. It says here, "Judge Mayer moved rapidly when the condemnatory nature of the letter was brought to his attention." Where did you get that from? A. Why, the order
was over here in the building, Federal Building. 753

Q. Was that reported by one of your men or did you come over and see it? A. I saw a copy of the order here.

Q. And at what time did you see that? A. Why, I could not tell the exact time; it was sometime after I got this City News copy of the letter.

Q. Well, it is a fact then, that the order of Judge Mayer was entered before the publication of the letter in your paper? A. Certainly.

Q. And from whom did you get the information that "Henry L. Stimson, counsel for Job E. Hedges,

754 receiver for the New York Railways Company, who had heard the letter read at the conference, consulted with the Judge?" A. I don't remember that particular part.

Q. Well, "Who soon afterwards signed an order entitled, 'United States of America, plaintiff, against Charles L. Craig, defendant,' and which read," and then giving the order. You got that intelligence certainly either around this building or the chambers of the Judge over in the Woolworth Building? A. I might have gotten it at those two
755 places, or from some other reporter working on the case. There are various sources of information.

Q. Really, we are not making very much progress on it because your memory is not very distinct about that part of the item, is it? A. No, it is not.

Q. Have you been called before the Grand Jury under a Grand Jury subpoena and asked to go over to Mr. Matthews' office? A. I was over to Mr. Matthews' office.

Q. Did you go over there on a Grand Jury subpoena? A. I don't know just what the document was.

756 Q. Something that was served on you? A. Something calling for my appearance, whatever it is.

Q. At any rate, you were not taken in before the Grand Jury, but sat down and had a nice little talk with Mr. Matthews? A. I did, yes, sir.

Q. And when you got through with that talk he let you go? A. Yes.

Q. Did you sign a paper for him? A. You mean a statement?

Q. Yes? A. I don't believe I signed a statement.

Q. Have you got that subpoena or paper that you got, that was served on you? A. I don't know.

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Q. Well, do you recall that it was a John Doe and "in contempt," that it said that on the corner of the Grand Jury subpoena? A. I don't recall.

Mr. Matthews: That is all.

ALFRED W. PIERCE, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews: 758

Q. Mr. Pierce, on October 6th, 1919, were you an Evening Sun reporter covering the City Hall? A. I was.

Q. Do you recall the so-called Craig-Nixon letter on that day? A. Yes, sir.

Q. And did you write a story based on that letter? A. Yes, sir.

Q. Did you see that letter in the story? A. Practically all of it.

Q. Where did you get the text of the letter? A. I got the text of the letter from a copy of the letter 759 received in the Reporters' room at City Hall.

Q. Was your story containing the text or portions of the text of the letter, published in the Evening Sun on that day? A. It was.

Q. Have you here editions of the Evening Sun in which it was published? A. Yes, sir, those are several editions of the Evening Sun on that day in which the story, such as I wrote it, appears. There were other parts of the story that I did not write which also were incorporated in the same story.

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Q. What parts of the story came from you? A. The parts about the letter, about the Public Service Commission.

Q. And covering the text of the letter? A. Yes, sir.

Q. These editions seem to be "Sporting" and "Final?" A. The last edition of the Evening Sun that day. The second "Sporting Final" edition on the second page contains the combined story of what I wrote from City Hall and what appeared from this building, and they appeared sepa-

761 rately in previous editions and were finally put together in one complete story in the last edition that day, and that really covers everything that appears in any earlier editions of the Evening Sun. For example, this edition here (indicating) only has the one end of the story.

Mr. Matthews: I offer that edition in evidence.

Mr. Mooney: I object to it on the ground that it is not connected with the defendant.

Marked Government's Exhibit 9.

762

Q. Is that your end of it? A. No, that is from this building.

Q. The complete final I will not offer because he says it did not contain his story? A. The letter got left out of that edition.

Q. Is that a complete paper?

Mr. Mooney: What is that called?

The Court: This is the complete final with five stars.

Mr. Mooney: He says the letter got left out of that complete final five stars edition.

763

Q. I show you what appears to be the "Night Final" with "Wall Street Prices" and ask you if that contains your story with the text of the letter (handing paper to witness)? A. Yes, sir, that contains my story with the text of the letter. This edition called the "Night Final" is earlier than the "Complete Final." The first thing in the Evening Sun was the "Night Final" story about the letter and then in the "Complete Final," the next edition, was the story about the contempt charges being started, and then in the last edition, the "Sporting Final," both stories were hooked up and put in here. 764

Mr. Matthews: I offer this "Night Final" in evidence.

Mr. Mooney: Same objection as to the last one.

The Court: Yes, overruled.

Marked Government's Exhibit 10.

Mr. Mooney: Exception.

Q. Is the Evening Sun a paper of general circulation in and throughout the City, County and the Southern District of New York? A. Yes. 765

Q. And was it on October 6th, 1919? A. Yes.

Cross Examination by Mr. Mooney:

Q. Will you tell us as near as you can the time that the Night Final gets on the street for sale? A. On the date in question the Night Final should have been on the street, downtown, at about 3:30 P. M.

Q. And what time does the Complete Final get on the street or what time did the Complete Final

766 get on the street at about that date? A. I should say about 4:30.

Q. Now, who was covering the story over here, if you know? A. I understand that our man regularly assigned to cover this building, I forget his name.

Q. Well, anyway, he was your regular man? A. Yes, he was our regular man in this building for years.

Q. Were you over at the transit conference at all? A. No, sir.

767 Q. You just awaited the events over in the City Hall? A. Exactly.

Q. On the theory that anything and everything concerning the public interest relating to the franchise situation would find its way in there in the proper time? A. I hoped it would.

Q. Well, and it is a reasonable expectation, isn't it, in the pursuit of your business, that matters that relate to public affairs find themselves, in traction matters for instance, into that room, isn't that so? A. Very many do; I would not say all of them, but much of them.

768 Q. It is what you might expect and what you did expect and that is what happened in this case, that the letter came over there? A. The letter came over there, yes.

Q. Have you been called before the Grand Jury under John Doe subpoena? A. No, sir.

Q. In this case? A. No, sir; I was subpoenaed to come here as a witness.

Q. Yes, but I mean before this, sometime ago? A. I was subpoenaed originally several weeks or months ago and I brought over the papers that we have just examined here.

Q. Did you look at the subpoena then to see

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whether it said in the corner, "John Doe, Contempt of Court"? A. No, sir, I did not look. A subpoena came to my office and my office handed it to me and said, "Here's a subpoena for you to take care of," because it was my story, and I took the subpoena and came over.

Mr. Mooney: That is all. Without recalling the witness, I will crystallize my objection to this paper which was offered in evidence, Exhibit 7, for identification, to the last line thereof as follows: "The Comptroller, however, issued copies of his letter to Commissioner Nixon." 770

The Court: Is that your only objection?

Mr. Mooney: That is the only objection.

The Court: I will take the paper with that excluded.

DANIEL A. BREEN, a witness called on behalf of the Government, being duly sworn, testified as follows:

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Direct Examination by Mr. Matthews:

Q. Mr. Breen, what was your business on October 6th, 1919? A. Evening World reporter.

Q. Did you cover the City Hall on October 6th? A. Yes, sir.

Q. Do you recall a conversation with Mr. Kerrigan in which you learned of the so-called Craig-Nixon letter? A. I do.

Q. About what time of the day was that? A.

772 Around noon, I would say, I cannot exactly place it.

Q. I wish you would state the substance of that conversation? A. I happened to be in the office on another matter and I met Mr. Kerrigan and he voluntarily showed me a copy of that letter. I read it and I then remarked, "It is pretty hot stuff," and he said he was going to send out copies over to City Hall, and I said, "I will be there when they arrive," and I was.

Q. As near as you can fix it, it was around noon?
773 A. Around noon, yes.

Q. Where did you go from there? A. Now, I have been trying to recall just where I went. I think I went to the City Clerk's office. I think I was away one-half to three-quarters of an hour before I went back, and when I reached City Hall, the flimsies had arrived and the other men were discussing it.

The Court: You mean the other reporters?

The Witness: Yes, in room 9.

774

Q. Did you get one of the flimsies? A. Yes, sir.

Q. Had you been in the Comptroller's office on an earlier occasion that day than the time you just mentioned? A. I had not.

Q. You went there only one time that day? A. Yes, sir.

Q. Did you, after you got to the City Hall, and got a copy of this letter, write a story based on it? A. I did.

Q. And use the flimsy as part of the text of your story? A. I did.

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Q. Was that thereafter published in the Evening World? A. It was.

Q. Is the Evening World a paper of general daily circulation throughout the City and County and Southern District of New York?

The Court: City and County of New York.

A. I don't know anything about the Southern District. I know the City and County of New York.

776

Q. And also in the State of New York? A. I presume so.

Q. Have you a copy of the paper in which that story appeared? A. I have (producing paper). The part of the story which I wrote is on the second page. This is the Final Edition which is on the street at 4:30. The story which I wrote made its first appearance in the latest extra which is on the street at 2:30. My part of the story in this last edition, which was subordinated by subsequent developments, is on the second page and the contempt proceedings lead the story.

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Q. Is the text of the letter there set out? A. Why, a very small part.

Mr. Matthews: I offer the paper in evidence; it has already been marked for identification as Government's Exhibit 4.

Mr. Mooney: That is the same one that was identified by Mr. Dobson, isn't it?

Mr. Matthews: Yes, number 4.

Mr. Mooney: I object to that on the ground that it is not connected with the defendant.

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The Court: Overruled.
Mr. Mooney: I except.
Marked Government's Exhibit 4.

Q. Did you at any time talk with Mr. Kerrigan on that day concerning this letter? A. Not that I recall.

Q. Do you recall telephoning him? A. No, I do not.

Cross Examination by Mr. Mooney:

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Q. Now, Mr. Breen, this final edition, I got the hour as 2:30? A. 4:30.

The Court: There was an earlier edition, Mr. Breen said came out at 2:30.

Q. And we haven't got that earlier edition in court, so far as you know? A. So far as I know, no.

Q. So that was a mere passing reference to an earlier edition of the paper, regardless of what was in it, is that so? A. I testified that the story that I
780 wrote did not contain the contempt proceeding, that the story that I wrote that appeared, that was on the street at 2:30.

Mr. Mooney: Then I am going to ask to have that stricken out, your Honor, because there was confusion in that way. I could not quite get the 2:30 and the 4:30 editions clear. May I have struck out the statement now made which was only made to correct what had gone before, that his story appeared on the street at 2:30, because we

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have no paper here nor material to address our questions to. I do not think that ought to stay in without some foundation for it.

The Court: I will strike out the 2:30 edition.

Q. Did you cover the contempt part of it as well as the City Hall end of it? A. No, sir.

Q. And did you have anything in your article about—well, you put your finger on your story, please? A. My story would begin there (indicating). It is a question whether it does; after a 782
story goes into a newspaper office, it is very hard to tell what would happen to it, and it is hard to tell where it does begin. Sometimes you have got to be very careful in saying just where your story does begin. The best way to answer that would be to say that the Craig letter begins here (indicating) and it was the Craig letter on which my story was based. My story had an introduction; then came the Craig letter, and then I suppose when the later developments came along, this would lead and then the Craig letter followed.

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Mr. Mooney: I was going to ask to strike out "later developments."

The Court: Instead of "later" say "when the matter of the action of Judge Mayer"—put it that way to identify it.

Q. In other words, you are not testifying to time in this action, as a matter of knowledge; you are only dealing with it offhand? A. I don't know as I understand you.

Q. You have no particular point of knowledge as

784 to time? A. No, I am just speaking of the mechanics in my office.

Q. You have stated, in substance, in answer to the questions that have been put to you all that you know about this matter, have you? A. Yes, sir.

Q. In other words, the questions that have been put to you by counsel have brought out substantially all that you know about this matter, have they? A. I think so.

785 Re-direct Examination by Mr. Matthews:

Q. Are you still with the Evening World? A. Yes.

Q. Can you get for us a copy of your earlier edition? A. Why, I suppose I could. I have to state to my office what the object would be.

Q. We can send a subpoena up there? A. I would rather have you do that, then. I would have to state the reason for the request.

Mr. Matthews: That is all.

786 Mr. Mooney: That is all.

The Court: We will adjourn until 2 o'clock to-morrow and sit to-morrow until 5.

Adjourned at 6:55 P. M. to May 11, 1920, at 2 P. M.

787

New York, N. Y., May 11, 1920,
2 o'clock P. M.

Same appearances.

HAROLD A. VIVIAN, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Vivian, on October 6th, 1919, were you a reporter for the World; the New York World? 788
A. Yes, sir.

Q. Were you at that time assigned to the City Hall? A. Yes, sir.

Q. Do you recall the letter to which reference has been made in this trial from Comptroller to Commissioner Nixon? A. Yes, sir.

Q. Did you get a copy of that letter on that day? A. Yes, sir.

Q. Where? A. At the City Hall.

Q. At what time? A. About 2 o'clock in the afternoon.

Q. I show you some papers which were pro- 789
duced by your paper and ask you if that is a portion of the letter (handing papers to witness)? A. I cannot say whether it is or not, Mr. Matthews.

Q. Is that article prepared by you? A. I have no recollection of these particular pieces of paper and they do not bear any of my handwriting.

Q. Well, what did you do with the letter after you got it? A. My recollection is that in the evening of that day I took the copy of the letter that I had obtained at the City Hall to the World office, and there used it in the preparation of the

790 story which appeared the next morning in the Morning World.

Q. Is this paper which I now hand you a copy of that edition of the Morning World (handing paper to witness)? A. Yes, sir, I believe it is.

Q. Is the World a newspaper of general daily circulation throughout this Country and State? A. Yes, sir.

Mr. Matthews: That is all. I offer the paper in evidence.

791 Mr. Mooney: We object to it upon the ground that it is not connected with the defendant, your Honor.

The Court: Overruled. You mean you offer the newspaper?

Mr. Matthews: Yes.

Marked Government's Exhibit 11.

Cross Examination by Mr. Mooney:

Q. Do you recognize the article as being your own article, in whole or in part, being Exhibit 11,
792 which has just been offered in evidence? A. My recollection is that I prepared the whole article for publication, but that the matter in it was partly my own and partly someone else's.

Q. And do you know who that someone else was? A. I am not positive.

Q. We had a reporter on the stand from the World, did we, yesterday, or was it the Evening World?

Mr. Tarbox: The Evening World.

793

Q. I call your attention to a portion of the article near the head and ask you whether you recognize the start of that as your style or substantially as the substance of your work. A. I believe I wrote that in its entirety; the first two or three paragraphs.

Q. Now, I call your attention to that sentence which commences, being the second sentence in the article, "Within two hours after Judge Mayer had asked the United States Attorney Caffey to file a formal information concerning Mr. Craig's conduct, the latter will unquestionably be summoned 794 before the Court in a contempt proceeding to explain his utterance." I ask you if that has any relation to the earlier paragraphs and where you got the information there stated, as follows: "Within two hours?" A. From whoever it was on that particular day, who was covering the Federal Building for the World.

Q. You did not come to the Federal Building yourself, did you, on that day? A. I did not.

Q. And you neither saw the original direction for the information referred to in that sentence or a copy of it, did you? A. I did not see the 795 original; whether I saw a copy or not I am not positive.

Q. I show you the paper from the files that is marked "Filed October 6th, 1919," and ask you whether that tends to refresh your recollection whether you saw a copy of that paper (handing paper to witness)? A. My recollection is that I saw some papers from this building on that day, but whether this was one of them I really could not say. I saw them only casually. They were being handled by the other reporters.

796 Q. Now, we should in some appropriate way refer to this upon the record. I don't know whether it is the custom to mark the file papers for identification.

Mr. Matthews: I take it that it is already part of the record, and it may be treated as such.

The Court: It can be referred to; it need not be marked.

Mr. Matthews: This is the order of
797 Judge Mayer of October 6th, 1919.

Mr. Mooney: And it is marked as follows, "U. S. District Court, Filed October 6th, 1919," and on the lower rim, "S. D. of New York," and it bears above the figure 16, and underneath it a line 505 below the line.

Re-direct Examination by Mr. Matthews:

Q. Just one question. You say you got that letter in the City Hall. Where in the City Hall did
798 you get it? A. In the mail box in which all such documents for the Morning World are usually placed in.

Q. In what room? A. In room 9.

Q. Is that what they refer to as reporters' room? A. The reporters' room.

Mr. Matthews: That is all.

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GEORGE D. MORRIS, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Morris, were you a reporter for the Evening Telegram on October 6th, 1919? A. I was.

Q. And did you cover the City Hall on that day? A. I did.

Q. Is room 9 the reporters' room over there? A. Yes.

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Q. Do you recall the letter from Comptroller Craig to Commissioner Nixon? A. Yes, sir.

Q. Did you get a copy of it? A. Yes, sir.

Q. Where? A. In the reporters' room; I don't know whether it was in my box or whether it was handed to me.

Q. Each of the papers over there have a box in the nature of a pigeonhole? A. Yes, sir.

Q. What did you do with it after you got it? A. My recollection is that after reading it, I called up the Comptroller's office and had a talk with Mr. Kerrigan, and then I sent it to my office.

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Q. What did you talk to Mr. Kerrigan about?

Mr. Mooney: That I object to, your Honor. There is no act of Mr. Kerrigan, particularly as to the alleged acts or fact, that would be competent to bind the Comptroller in such a proceeding as this.

The Court: I will overrule the objection.

Mr. Mooney: I except.

A. Why, the copy I had, I think was very indistinct, and there were some questions raised as

802 to whether it did come from the Comptroller's office, and I asked Mr. Kerrigan, I think, whether it came from the Comptroller's office.

Q. And what did he say? A. My recollection is he said, "Yes," and then I sent it to my office.

Q. I show you some sheets of paper and ask you if you can identify them (handing papers to witness)? A. I will say yes.

Q. What are they? A. This is a cutup copy of the letter received.

Q. Is that physically the same letter you got
803 out of your pigeonhole or out of room 9? A. I would say yes.

Q. And what then did you do with it? A. I sent it to my office.

Q. To the Evening Telegram? A. Yes.

Q. Was it thereafter the article which you prepared, thereafter published in the Evening Telegram? A. Yes.

Q. Is the Evening Telegram a newspaper of general daily circulation throughout the County and City of New York? A. Yes.

804 Mr. Matthews: I offer in evidence the pages identified by the witness.

Mr. Mooney: I object to that upon the ground that it is not connected with the defendant.

The Court: Overruled.

Mr. Mooney: Exception.

The pages marked Government's Exhibit 12.

Q. I show you a clipping and ask you whether that is the article which you prepared as it appeared in the Evening Telegram of that date (handing

805

document to witness)? A. I did not prepare the article. All in connection I did with it, I just got that letter over in the City Hall and I sent that letter to the office. That is all the preparation I had to do with it.

Q. Can you identify that as the article containing that portion of it? A. Yes, sir.

Mr. Matthews: I offer that in evidence.

Mr. Mooney: I object to it upon the ground that it is not connected with the defendant.

806

Overruled; exception.

Marked Government's Exhibit 13.

Mr. Matthews: That is all.

Cross Examination by Mr. Mooney:

Q. Did your work wholly and entirely consist of sending in to your office the parts of the flimsy letter which are pasted on these sheets, that have now been marked Government's Exhibit 12? A. In connection with this case?

Q. Yes? A. Yes, sir.

807

Q. So, unless you read the article, as an ordinary reader would do after it was published, unless that be the fact, you have no knowledge at all of the actual contents of this Government's Exhibit 13, which purports to be an extract or portion of your paper, have you? A. Only as far as that letter is concerned.

Q. In other words, you do not even know at this day whether you read the article when it came out, do you? I suppose newspaper men are more or less interested in their work as it appears, but

808 have you an independent recollection of having read the article in its entirety? A. No, sir.

Q. And you have no knowledge of the publication of it as an independent matter of your own memory? A. No.

Q. Is it a safe deduction to draw that somebody else was on the story, as it is called, with you? A. Well, if I can see the first page of the copy or the first part of the story, I could tell. I don't know whether we had anybody assigned to it or whether it was a City News story.

809 Q. I ask you something that Mr. Matthews has handed to me, and ask you whether that is the first page to which you refer and whether that gives you any intelligence upon the subject (handing paper to witness)? A. The second page will tell you.

Q. Turn to the second page? A. That I know is City News copy.

Q. And turning to the third page, is that City News? A. Yes, sir, the fourth page is also City News copy.

Q. Well, to shorten your examination, the real 810 truth of the matter is that you—that I can make better progress with some other witness upon this point? A. Absolutely.

JOSEPH HAAG, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Haag, I understand that you are the secretary of the Board of Estimate & Apportionment? A. That is right, sir.

811

Q. And as such, you have custody of the minutes of the meetings of the Budget Committee of the Board? A. Yes, sir.

Q. And you have produced here the minutes of the meeting held on October 6th, 1919? A. As requested by the subpoena, yes, sir.

Q. I wish you would indicate the pages in the volume which you have produced which included the minutes of the meeting for that day (handing books to witness)? A. This little volume is not paged from beginning to end, except each meeting. A transcript of the notes on each meeting is paged 812
separately, so that for identification I would have to—well, that is the Committee on Finance and Budget (indicating); disposition of matters on calendar on Monday, October 6th, 1919.

Q. Then follow a number of pages which include these minutes? A. Yes, sir, seven pages.

Q. Can you tell me by whom these minutes were kept, who physically did the work of keeping the minutes? A. The stenographer's name is J. H. Schwarting.

Q. Where is he now? A. Well, he is a stenographer attached to the office of the Secretary of the 813
Board, Mr. Schwarting is quite ill recently.

Q. He is still at home? A. He is, yes.

Q. He is not there to-day? A. No, he is not there to-day; has not been for at least two weeks.

Q. Do you know his residence address? A. I could get it for you; I haven't it in my memory.

Q. I wish you would. Did he do the work of transcribing the notes, also; did he transcribe his own notes? A. Well, that is the extent of the notes that he took at that session.

814

The Court: He not only took it down in stenography but does he write it out?

The Witness: He dictates it to a typewriting copyist, to a dictaphone and he transcribes it from that.

Q. Who is the dictaphone operator? A. W. J. Keuleman, he is the typist.

Q. He is still with the department? A. Yes.

Q. Is he there now? A. He is.

Q. Do you know personally anything about the
815 accuracy of the minutes of this meeting? A. No, I don't think I could identify that because I do not think I attended that session; quite sure I didn't.

Q. Would your name be here if you had been present? A. No, not necessarily.

Q. I notice some pencil marks at the top of page 1; in whose handwriting are they? A. They were made by the assistant secretary of the Board, Mr. Matthews.

Q. This is marked "recess 1:25 to 2:30 P. M." Do you know what that means, of your own knowl-
816 edge? A. No. I suspect that the Committee took a recess between those hours, luncheon recess.

Q. May I have these to mark them for identification? A. Yes.

Mr. Matthews: They will be returned after we are through with them here. I ask that these minutes, identified by Mr. Haag, be marked for identification.

Marked Government's Exhibit 14, for identification.

Mr. Matthews: That is all.

817

IRVING E. PINOVER, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Pinover, on October 6th, 1919, were you a City Hall reporter for the Evening Journal? A. Yes, sir.

Q. Did you have occasion to be in rooms 9 of the City Hall on that day? A. On that day, yes, sir.

Q. Did you there procure a copy of the letter to which reference has been made, of Comptroller 818
Craig to Commissioner Nixon? A. Yes, sir.

Q. Where did you get the letter? A. I found the letter either in the letter box of the press room of City Hall or on a desk.

Q. What time was it when you got this letter, as nearly as you can recall? A. I don't recall.

Q. What is your best recollection? A. It may have been around the lunch hour.

By the Court:

Q. What do you mean by lunch hour? A. From noon till 1 o'clock; I should say it might have been 819
well along towards lunch hour that I received my copy.

By Mr. Matthews:

Q. Between 12 and 1? A. That is my best recollection; it was well along towards the lunch hour.

Q. What did you do with the letter after you got it? A. I am not certain as to that; I cannot say definitely whether I wrote the story or telephoned it, or sent the—or simply transmitted a copy of

820 Mr. Craig's letter to my office by messenger, supplementing this latter action with a telephone explanation to my office.

Q. Is the Evening Journal a newspaper of general circulation throughout the City, County and State of New York? A. Yes, sir; to the best of my knowledge and belief, it is, sir.

Q. Was the letter thereafter published, to your knowledge, in the Evening Journal? A. My recollection, sir, is that it was not published in the Evening Journal the day the letter was made public.

821 Q. Was it published the following day? A. I do not know, sir.

Q. Can you identify the paper which I hand you as a copy of the Evennig Journal of October 7th (handing paper to witness)? A. This is a copy of the New York Evening Journal of October 7th.

Mr. Matthews: I offer it in evidence.

Mr. Mooney: I object to it upon the ground that it is not connected with the defendant.

Overruled; exception.

822 Marked Government's Exhibit 15.

Cross Examination by Mr. Mooney:

Q. Do you recognize the article as being entirely of your production; in other words, are you the only man who worked on the article? A. Well, when?

Q. Prior to its publication, prior to its publication on October 7th, 1919. Did anyone but yourself take part in the composition of any of the matter as it now appears in the paper, if you can say? A. I had no part, so far as my memory goes, in the

823

preparation of the article in the New York Evening Journal of October 7th.

Q. Your work consisted entirely of taking the copy of the letter which was on the flimsy and forwarding it, in whole or in part, to the office of your newspaper; is that correct? A. Well, Mr. Mooney, I have told you, sir, that I do not recall exactly how I transmitted the story to my office on October 6th, the day the letter was made public.

Q. I intended to leave that open in my question. In other words, referring to your work, without regard to the method of its transmission, the only 824 work performed by you was the taking of the letter on the flimsy and transmitting it, or a copy of it, in whole or in part, by some means or another, to your newspaper office? A. On October 6th?

Q. On October 6th? A. Yes, sir.

Q. That is correct? A. On October 6th?

Q. Yes? A. Yes, sir.

Q. Do you know who worked on the rest of the article or story? A. I do not, sir.

Mr. Mooney: That is all.

Mr. Matthews: That is all.

825

EDWIN WESTRATE, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Westrate, on October 6th, 1919, were you on the staff of the Evening Mail? A. Yes, sir.

Q. Did you cover the letter, the story of the let-

826 ter that was sent by Comptroller Craig to Mr. Nixon on that day? A. Yes, sir.

Q. Did you prepare an article based on that letter which was subsequently published in the mail? A. To the best of my recollection I got the letter from the City Hall, took it over to the office, was there told to cut it down and prepare a short lead for it, which was to be prepared in a general story on the transit conference, and to the best of my recollection that is what I did.

Q. Where in the City Hall, did you get the let-
827 ter? A. In the reporters' room.

Q. You got one of the flimsies in that room? A. Yes, sir.

Q. Can you recall approximately the time you got it? A. It was between 12:30 and 1, more nearer 1 o'clock than, I think, 12:30.

Q. Were you in the City Hall at the time the letter got there, or did you go there and find the letter when you arrived? A. There were two or three of the reporters, one from the building at 49 Lafayette Street, where the conference had been held in the morning, up at the City Hall, and found
828 that the flimsy had not yet arrived, and from there we went—

Mr. Mooney: No, you may pause there as to what the other men did.

The Court: I understood him to say "we."

The Witness: Yes, we; and two of us, I think it was Mr. Daly and myself, I met Mr. Daly at the Municipal Building and he said the letter was going to be sent to the City Hall, and, if I recall correctly, when we arrived at the City Hall, the letter had

829

already been brought there and was being distributed. Someone was passing out the copies in the reporters' room.

Q. Was the story which you wrote, I believe you did say it was published in the Mail? A. Yes.

Q. I show you two papers, one the Evening Mail, five stars, and the other, "The Final Sports Complete," both of October 6th. Can you identify those as the Evening Mail published on that date (handing papers to witness)? A. Yes, sir.

Q. Did each of those papers contain the story 830
which you prepared based on the letter? A. I did not prepare the entire story in either case. I think I just prepared the lead which preceded the actual clippings and the resume of the letter which Mr. Craig wrote.

Q. Did you prepare the resume? A. Yes, sir.

Q. Does that appear in each of the papers which I have shown you? A. No. The story which I wrote did not appear in this edition, that is, in the five star. It was the story which occurred in the Final Sports Complete which I wrote.

831

Mr. Matthews: I offer in evidence paper referred to as the Final Sports Complete, being a copy of the Evening Mail of October 6th, 1919.

Marked Government's Exhibit 16.

Mr. Mooney: I make the same objection, that it is not connected with the defendant. Will you have the other paper marked for identification, Mr. Matthews, in which he says this did not appear?

Mr. Matthews: Certainly.

Marked Government's Exhibit 17, for identification.

832

Q. Is the Evening Mail a newspaper of daily and general circulation throughout the County and State of New York? A. Yes, sir.

Q. And was it at that time? A. Yes, sir.

Mr. Matthews: That is all.

Cross Examination by Mr. Mooney:

Q. Now, do I understand that from your answers you went to the public Service conference yourself?
833 A. Yes, sir, I went to the Public Service Commissioner's office and did not arrive there until after the time the reporters had been requested to leave the conference; therefore, I was not in the conference at any time.

Q. Of course, what you have referred to now is what you heard; that is, you heard that the reporters had been excluded from the conference? A. Yes.

Q. Now, was your visit there, was it fruitful of anything at all? A. Yes, to the best of my knowledge, sometime after the close of the conference, or
834 immediately after the close of the conference, as nearly as I recall, we were told that a statement was being prepared for the press containing a resume of some of the things, I don't know how much, of the conference it covered; I do not recall.

Q. Did you hear up there at that place that a hot letter had been read from the Comptroller, or some such phrase as that? A. I heard another one of the reporters make that statement.

Q. That is, in the group where you were gathering the news, is that it? A. Yes, I think it was in the hallway, outside of the secretary's office of the Commission.

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Q. And do you recall the name of that reporter? A. I do not. I do not believe I could identify him if I saw him.

Q. Then, when you heard that statement, you got hot-foot after the letter, didn't you? A. It was our purpose to get the letter if it was possible.

Q. But you could not get your story in in time for the five star paper, the Five Star Edition? A. I did not handle the story which was in the five star edition, and if I recall rightly, reference was made to the letter and nothing more in that story. I did not handle all of the story at any time that 836
day. I was out on the story and had sent the material into the office which I received from Mr. Nixon's office, and then came to City Hall to get what was called the Craig letter.

Q. What time did the Five Star Mail come out on October 6th, 1919, or thereabouts? What was the hour for it coming out on the street? A. I do not recall. The times of the editions have been changed so frequently in the last few months that I don't remember; I would say probably about 3:30, but I may be wrong about that.

Q. Well, it is not a question of being wrong, be- 837
cause none of us can reproduce exactly, but I call your attention to the fact that it has at its head, "Closing Prices," and I think all of us know that Closing Prices means that that contains the matter from the Stock Exchange; is not that so? A. Yes, it would be after 3 o'clock then.

Q. And can you tell what time the "Final Sports Complete" edition comes out, which has been marked here as number 16? A. Five-thirty.

Q. Is the article entirely yours for this edition or does it contain the work of others such as you have indicated in answer to another question

838 (handing paper to witness)? A. Let me look at it a moment. A very small proportion of this one is mine, only that portion which refers to the letter, I think I wrote the first two paragraphs of that story. I think all of that story that I wrote was the first two paragraphs.

Q. Well, what about the very next paragraph, which is headed, "Government's Court Order"; what do you call that heading, do you call that a subhead? A. Yes.

Q. Now, after that appears the words "After the
839 conference, Henry L. Stimson, of Winthrop & Stimson, counsel for Job E. Hedges, receiver of the New York Railways Company, called upon Federal District Attorney Caffey. Mr. Stimson had with him an order made by Judge Mayer in a proceeding entitled, "United States of America, plaintiffs, vs. Charles L. Craig, defendant." Now, is any part of that your composition? A. I do not recall; I do not remember whether I wrote that or not.

Q. Now, do you recall receiving that information, that is to say, the information contained in
840 what has just been read, first hand? A. No, I did not. I think I read it at that time in the City News copy.

Mr. Mooney: That is all.

Re-direct Examination by Mr. Matthews:

Q. Do you know who prepared the article that appeared in the Five Star Edition? A. I do not, but to the best of my recollection, I was told when I reached the office that some one had written some City News copy.

841

Q. You get the City News service in your office? A. Yes, sir.

Q. And in preparing your article, did you use in part some of the City News copy? A. I don't think that I did; I don't want to say positively. I may have had the City News copy at my side, but I used nothing, I think, in referring to the letter except the letter itself.

Q. As to other portions of the story, aside from the letter itself, did you use some of the City News copy? A. I don't recall, but the chances are that I did, if I wrote it.

842

Q. Do you recall when you first appeared at 49 Lafayette Street? A. You mean the time?

Q. Yes? A. It was about 10:30 or 11 o'clock; it may have been a little later than that.

Q. At what time was it you first learned of the Craig letter? A. That I don't remember, but I think it was about noon. I think it was while the reporters were discussing when they would receive the Nixon statement, and at that time I heard someone or something about a letter which Mr. Craig had written to Mr. Nixon, and two reporters and myself went into one of the adjoining offices and there, I think, one of them called up the Comptroller's office, and, I think, spoke to Mr. Kerrigan; and we received information there, he did, through the office, that the letter would be given out at the City Hall.

843

Q. Did you get any further details of the letter itself at 49 Lafayette Street? A. No.

Q. Other than it was a letter from the Comptroller to the Public Service Commissioner? A. No, that is all we heard except that it would probably form the best portion of the story, that it would make the best feature of the story.

844

Re-cross Examination by Mr. Mooney:

Q. That is, you have told us in ordinary language, but we lawyers are sometimes a little more precise than that. You told us what you learned there. When the letter was spoken of in the way that you described, you learned, did you not, that the letter had been read at the conference; you learned that, didn't you? A. I do not recall perfectly, but to the best of my recollection, we were told of the letter, that Mr. Nixon had received a
845 letter; I do not recall whether it had been read at the conference or not.

Q. That is, you cannot recall that distinctly, but that is your best recollection, that you did learn that it had been read? A. No, I would not want to commit myself to that statement, because I am not positive enough of the fact.

Q. Well, what caused me to ask you these later questions was that one of your answers contained the statement that the letter would be or might be the best part of the story, and I am just drawing out the surrounding language of that; that is to
846 say, a person who would make such a statement as that to you probably did tell you why or how or under what means he had learned that he thought it would be the best part of the story? A. Well, in connection with that I might say that the reference to the letter had been made just as I reached the conference of the reporters. Two or three reporters were speaking together and it was said that the Craig letter would be one of the things we would want because it would probably furnish one of the real features of the story.

Q. Was the statement made to you then at that time that Mr. Stimson, or Col. Stimson, had taken

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away the letter or a copy of the letter to Judge Mayer? A. I don't recall any reference to Mr. Stimson whatsoever.

By Mr. Matthews:

Q. You referred to a conference of the reporters. Do you mean by that when you first arrived at 49 Lafayette Street or after you had been there awhile, you went over there and joined several reporters and discussed this matter? A. After we had been there awhile, we went downstairs and 848
heard that the statement of Mr. Nixon was in the course of preparation, and down there I ran into a couple of other fellows.

Q. And that was in the conference room after the hearing had adjourned? A. I think that it was, yes.

REGINALD WILSON, a witness called on behalf of the Government, being duly sworn, testified as follows:

849

Direct Examination by Mr. Matthews:

Q. Mr. Wilson, were you on October 6th, 1919, a City Hall reporter for the Sun? A. I was.

Q. Do you recall the letter from Comptroller Craig to Public Service Commissioner Nixon on that day? A. I do.

Q. Did you get a copy of that letter? A. Yes.

Q. Where? A. In room 9, City Hall.

Q. At what time? A. About 2 o'clock in the afternoon when I got in there.

850 Q. What did you do with the letter? A. Well, I read it and used it in the preparation of a story which appeared in The Sun the following day on the traction situation.

Q. Is this a copy of the Sun in which a copy of your story appeared (handing paper to witness)? A. Yes.

Q. Was The Sun a newspaper at that time of daily and general circulation throughout the City, County and State of New York? A. It was.

851 Mr. Matthews: I offer it in evidence.
Mr. Mooney: Same objection.
Same ruling; exception.
Marked Government's Exhibit 18.
Mr. Matthews: That is all.

Cross Examination by Mr. Mooney:

Q. Do you recognize the article or story as entirely your own, Mr. Wilson (handing witness Government's Exhibit 18)? A. Yes, that is all mine.

Q. Well, will you please tell us the source of
852 your information with respect to this paragraph, "Henry L. Stimson, counsel for Job E. Hedges, Receiver of the New York Railways Company, was said to have been particularly severe in his characterization of the Comptroller's statements, and he is credited with having first drawn Judge Mayer's attention to the contents of the letter." Do you know the source of your information in that respect? A. I do not recall now exactly, but—

Q. Give it generally, will you? Perhaps the next paragraph taken with it will help. I will read the next one, in fact, if there is no objection by anybody, I will lay this right in front of you because

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the page may help. I will just call your attention to the next one after that. It says: "Within an hour after the letter had been presented to the conference, Judge Mayer issued the following order to United States Attorney Caffey," and then follows the order. Now, taking those two things together, can you give us the source of your information as to either or both? A. Why, probably I got that from the man who regularly covered the Federal Building for the Sun at that time; that is my best recollection.

Q. Had you been at the traction hearing or conference yourself? A. I had not. 854

Q. And do you know whether any man was there covering the story at the time when it was all agreed that the reporters were excluded? A. No, I don't.

Q. My associates suggest that your work is not that work of going about to get the material. You take the stuff that comes to you and write it; is that your position? A. No, not always.

Q. You do go out to cover stories, do you? A. I did at that time.

Mr. Mooney: That is all. 855

Mr. Matthews: That is all.

JOHN VAN BIBBER, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Van Bibber, on October 6th, 1919, were you a reporter for the New York Evening Post? A. Yes, sir.

856 Q. Did you prepare a story or article for publication in the office on that day based on a letter that purported to have passed from Comptroller Craig to Commissioner Nixon? A. No, sir, I sent the letter over to the office, that is all I did.

Q. Where did you get the letter? A. In room 9, City Hall.

Q. At what time? A. Between half past 12 and 1, I should say.

Q. That is, the reporter's room in the City Hall? A. Yes, sir.

857 Q. Was the letter to your knowledge thereafter published in the Post? A. I believe it was.

Q. Have you before you a copy of the Post for that day? A. Yes, sir (producing paper).

Q. Is the Evening Post, and was it then, a newspaper of general circulation in and throughout the City, County and State of New York? A. Yes, sir.

Mr. Matthews: I offer the paper in evidence.

Mr. Mooney: Object to it on the same ground as heretofore stated.

858

Overruled; exception.

Marked Government's Exhibit 19.

Mr. Matthews: That is all.

Cross Examination by Mr. Mooney:

Q. Did you attend at the conference of the parties at the Commissioner's office at 49 Lafayette Street? A. Yes, sir, I was there for a few moments.

Q. Were you there before or after the reporters were excluded? A. I arrived there just as they were being excluded; I think I left directly afterwards.

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Q. Was any reference made to a letter from the Comptroller before you left? A. No, sir, I don't think so.

Q. And did you write the whole of the story that has been shown to you? A. No, sir; I simply sent the letter from the Hall to The Post.

Q. Can you tell us what time on or about October 6th, 1919, the Complete Final Five Star Edition, such as Exhibit 19 is, got on the street? A. I think at that time, it was published about 4:15.

Q. And was the Post then, within your experience, keeping up with the other papers in getting 860
out the news so far as speed and haste went? A. Yes, sir, I think so.

Re-direct Examination by Mr. Matthews:

Q. What time, if you know, did the edition of the Post, which was shown to you, go to press? What time did you have to get your story in in order to get it into this 4:15 paper? A. Well, probably between 3:30 and 3:45.

Q. I did not catch one or two questions which Mr. Mooney asked you. Did you say then that the 861
only portion of this article for which you are responsible is the portion which purports to quote the letter from Mr. Craig to Mr. Nixon? A. Yes.

Q. The rest was prepared by someone else and you know nothing about it? A. That is right.

Mr. Matthews: That is all.

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ROBERT T. BROWN, a witness, called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Brown, have you appeared here in response to a subpoena direct to the Evening World? A. Yes, sir.

Q. Have you produced the editions of the Evening World which were printed on October 6th,
863 1919? A. Yes, sir.

Q. How many editions were there on that day? A. I believe there were five; if I am not mistaken; I have a record here.

Q. I wish you would state the number of editions and the time each edition went to press? A. Evening World, October 6th, 1919—City Edition, to press, 7:42 A. M.

Mr. Mooney: That is the Evening World?

The Witness: Yes, sir, City Edition, 10:27 A. M.; Home, 12:33 P. M., Latest, 2:30 P. M., Final, 4:19 P. M.

864

Q. And you have produced a copy of each of those papers as published on that day? A. Yes, sir.

Q. Now, merely for convenience, if you will read your list of the time they were published, I will indicate it on the respective copies? A. City Edition, to press, 7:42 A. M.

Q. And then the next one? A. City Edition, 10:27 A. M.

Q. Is that what they call the City Extra? A. City Extra.

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Q. And the time? A. 10:27 A. M.
Q. And the next one? A. Home, 12:33 P. M.
Q. And the next one? A. Latest, 2:30 P. M.
Q And the next one? A. Final, 4:19 P. M.
Q. At approximately what time do those respective papers get on the street, how long after they go to press? A. That I couldn't tell you.
Q. You don't know? A. No, sir.

Mr. Matthews: I ask that the papers produced be marked for identification.

The Court: Very good.

866

Mr. Mooney: What importance—are these of the following day?

Mr. Matthews: No, these are of October 6th.

Mr. Mooney: Well, it is not possible that the papers prior to the 12:30 edition have any relevancy in this case, anything which happened on October 6th.

Mr. Matthews: Some of them will not go in evidence, I am sure. Suppose we mark the Final, the Latest Extra and the Home Edition.

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The Court: Those three will be marked; the others are immaterial from any standpoint.

Marked Government's Exhibit 20, for identification (Home Edition); 21, for identification (Latest Extra); 22, for identification, (Final Edition).

Cross Examination by Mr. Mooney:

Q. Now, can you tell us in which of these that you have produced there is first, a reference to this

868 letter which we are talking about here, do you know? A. No, sir.

Q. You don't know that? A. No, sir.

Q. Then, while counsel is assembling the papers together, and while we are turning these pages, you might state your relation to the Evening World on October 6th, 1919. What was your position? A. Connected with the auditing department.

Q. And where did you get these hours there that you have read from your memorandum? A. They were furnished to me by the counsel to the World.

869 Q. That is a good place to go when you come and testify. Does he keep things like that? A. I guess he does.

Q. Well, you are well prepared anyway. Who is the counsel for the World? A. Mr. White.

The Court: Is that Mr. Isaac White?

The Witness: Yes.

The Court: He is right in the World office, isn't he?

The Witness: Yes.

The Court: He was formerly a reporter for them?

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The Witness: I believe so.

Mr. Mooney: Shall we make a statement upon the record or shall we ask him to go over the matter? Counsel, after going over these two papers, finds that so far as they can observe, it does not appear in the Home Edition, that the letter or a part thereof, appears in the Latest Extra Edition on the second page, and that it appears in whole or in part in the Final Edition on the front page.

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The Court: Very well, then, the Home Edition can be excluded.

Mr. Matthews: Then I offer in evidence Exhibits 21 and 22 for Identification.

Mr. Mooney: I make the same objection as heretofore.

The Court: Same ruling.

Mr. Matthews: I think one or the other of these papers has already been received, and when we go to make up our records, we can consolidate these two exhibits as referring to the same paper. I have forgotten 872 the number of the other one or which one it is.

Marked Government's Exhibits 21 and 22.

Mr. Matthews: That is all.

GEORGE WOOD, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

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Q. Mr. Wood, you are connected with the Evening Globe? A. I am.

Q. And were you connected with it on October 6th, 1919? A. I was.

Q. What position did you hold with the Globe? A. I was at that time sitting at the head of the copy desk, handling all the copy that came in and parcelling it out from the reporters to the copy-writers, who, in turn, sent it to the composing room; virtually in charge of the news that came in.

Q. Did you have a reporter on that time and

874 on that day assigned to the City Hall? A. We did.

Q. What was his name? A. William A. Gramer.

Q. Do you know where he is now? A. Mr. Gramer is dead. He died since the first of this year.

Q. On October 6th, did you receive from Mr. Gramer the letter from Comptroller Craig or a copy of it from Comptroller Craig? A. I did, in an envelope with other things that he sent down from City Hall by messenger.

875 Q. Can you tell approximately the time you received it? A. I cannot, except by looking at the paper that you have in your office and looking at our files. I assume that it came in somewheres—

Mr. Mooney: One moment, I object to that as not disclosed.

The Court: Yes, objection sustained.

Q. Can you look at the papers to which you have referred and refresh your recollection as to the approximate time? A. I can.

876 Q. I wish you would see if those are the papers, and if they are, then see if you can refresh your recollection.

Mr. Mooney: The witness has spoken of a paper in Mr. Matthews' office. Do you mean by that a newspaper?

The Witness: This newspaper (indicating newspaper).

Q. Referring to a copy of the Globe? A. To a copy of the Globe and copies of the Globe of our files when I said the paper. My examination of our files and of this paper would lead me to believe

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that it came in somewheres subsequent to one o'clock and before two.

Q. In what state was the copy of the letter that you received? A. The letter?

Q. I mean, was it a carbon copy or a printed copy or what? A. No, flimsy, in flimsy.

Q. Have you it there? A. I have it right here, with an introductory paragraph written by Gramer—I identify his handwriting, I handed his copy right along—and there it is (indicating). It was cut up, of course, in the office, cut up by the typesetters for their convenience.

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Mr. Matthews: I offer in evidence the flimsy identified by the witness.

Mr. Mooney: We make the same objection as heretofore, that it is not connected.

Same ruling; exception.

Marked Government's Exhibit 23.

Q. Based on this flimsy, was a publication thereafter made in the Globe? A. It was.

Mr. Mooney: One moment. I object to that as involving a conclusion—it was "based upon." It is quite plain— 879

The Court: Sustained.

Q. Was the letter thereafter published in whole or in part in the Globe? A. In part, published in the Globe.

Q. Have you a copy of the Globe in which the letter in part appears? A. I assume it is the one the Judge now has.

Q. Can you identify that as the copy of the Globe of that date in which the part appears? A. I would

880 have to look at the story itself to see whether or not it is. Yes (observing), it is published in this Final Edition, five star, of October 6th.

Q. Was the Globe at that time a daily newspaper of general circulation? A. Daily, except Sunday.

Q. Throughout the City, County and State of New York? A. Daily except Sunday.

Q. Do you know whether this letter or parts of it were published in other editions on that day? A. No, I do not.

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Mr. Matthews: I offer this paper in evidence.

Marked Government's Exhibit 24.

Mr. Mooney: We make the same objection as heretofore, that it is not connected.

The Court: Same ruling.

Cross Examination by Mr. Mooney:

Q. You work with the New York City News reporters apparently, from the appearance of the bundle of papers produced here in Court? A.

882 From the appearance of those papers, I would say yes.

Q. Do you work at the same desk as Mr. Taintor did? A. Mr. Taintor was the managing editor and I was at the head of the copy desk.

Q. And how far was your desk from Mr. Taintor's desk? A. Probably the distance of this room.

Q. Now, in speaking of the hour, which you did a few moments ago, did you have reference to the hour stamp or stamps appearing on the material from the City News? A. No, I did not.

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Q. Mr. Gramer was not a regular City Hall man, was he? A. He was; he represented the Globe at the City Hall.

Q. Well, was he—when I say a regular man; was he there or was he supposed to be there daily? A. He was the man that was supposed to be there daily. He was the man upon whom we depended upon for our City Hall news.

Q. Well, of course, you depended, I suppose, in part, upon the City News, didn't you? A. As we do for everything, of course.

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Q. And you used on that day part of the City News stuff and part of Mr. Gramer's stuff? A. I saw that when I saw the copy that was handed to me by Mr. Matthews.

Q. Did you have anybody there on that day at the traction conference at the Public Service Commission's office? A. I don't recall; but I do not think we did.

Q. Did you, prior to your appearance here, receive a subpoena in a John Doe proceedings to go before the Grand Jury? A. No, I did not.

Q. Did you go to Mr. Matthews' office? A. I saw Mr. Matthews.

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Q. Well, before you went to see Mr. Matthews, had you not received a subpoena? A. I was at that time representing the Globe in Albany, and on one or two week-ends when I came back, the City Editor told me that Mr. Matthews wanted to see me. He wanted to see myself, Mr. Goofrey and Mr. Gregory and, I think, Mr. Schuster, but I didn't see any subpoena.

Q. You did not see the subpoena? A. No; I did not see the subpoena.

Q. And you did not get any nearer to the Grand Jury room anyway than Mr. Matthews' office, did

886 you? A. I did not. I went and saw Mr. Matthews to ask him to excuse me because I had to go back to Albany, and he told me if he wanted me before the Grand Jury he would let me know, and the next I knew I got a subpoena to attend Court here.

Q. Well, that excusing was to be an excusing from going before the Grand Jury, wasn't it? A. Unless I heard from him, yes; before the Grand Jury room.

Q. So that when you had that nice, little chat with him, you understood that you were on your
887 way to the Grand Jury, unless he excused you? A. I did, yes.

Mr. Mooney: So did I, but apparently, that is not the practice in New York. That is all.

CHANNING A. LEIDY, a witness called on behalf of the Government, being duly sworn, testified as follows:

888 Direct Examination by Mr. Matthews:

Q. Mr. Leidy, on October 6th, 1919, were you a reporter on the staff of the New York American? A. I was.

Q. Did you cover the City Hall for your paper on that day? A. I did.

Q. Did you get there a copy of a letter purporting to have been sent by Comptroller Craig to Mr. Lewis Nixon? A. I did.

Q. Where did you get it; in what room, and in what part of the room? A. Room 9, City Hall.

889

about 4 o'clock, I got my copy. I had seen it previous to that. I know when it arrived there.

Q. When did it arrive? A. It arrived a few minutes before one o'clock. It is my almost invariable custom to get to Room 9 at 1 o'clock and I usually ask Mr. Breen and Mr. Pinover what has happened. I got there on that day at my usual time and Breen and Pinover were there busy, very busy writing and they stopped writing to have an argument about a word that appeared in the letter from Mr. Craig. It was "momentous," and they were questioning whether it was meant to be 890
"momentous" or "monstrous," and that must have been about five minutes past one, and I looked over the letter and I don't know whether they put "monstrous" in or not.

Q. The two words were "monsfrous" and "monotonous," were they not? A. Oh, "monotonous"; yes, that is it; "monotonous."

Q. And to refresh your recollection, don't you recall that after some discussion it was decided in some way that the word "monstrous" was read and they used that word? A. I don't remember how it was decided. The word "monstrous" seemed to 891
them—

Q. What did you do with your copy after you got it? A. I stuck it in my pocket and at about 6 o'clock or 7 o'clock took it to the office and used it as a basis for writing the story.

Q. For the New York American? A. Yes, sir.

Q. Did your story thereafter appear in the New York American? A. I don't know; probably; I did not read it.

Q. I show you what looks like a copy of the American of October 7th, and ask you whether you

892 can identify it as a copy of the American for that day (handing paper to witness)? A. Yes.

Q. I also invite your attention there to an article on page 4, I believe it is, and ask you if that is substantially the article as you wrote it? A. Yes.

Q. Was the New York American at that time a newspaper of general circulation throughout the City, County and State of New York? A. I believe so.

Mr. Matthews: I offer the paper in evi-
893 dence.

Mr. Mooney: Same objection as heretofore; it is not connected.

Same ruling; exception.

Marked Government's Exhibit 25.

Cross Examination by Mr. Mooney:

Q. Mr. Leidy, did you attend the conference at the Public Service Commission, on Lafayette Street, on that day? A. I did not.

Q. Will you kindly tell us from what source you
894 got the information in the paragraph reading as follows: "Judge Mayers' request for an information to be filed by the United States District Attorney against Comptroller Craig, it is understood, was made at the request of Henry L. Stimson, counsel for Job E. Hedges, Receiver for the New York Railways Co. Mr. Stimson took the Comptroller's letter to Judge Mayer and the Judge's direction followed?" A. City News.

Q. And is that all the information that you have on that subject, what you got from the City News? A. Yes, sir, that is all.

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Mr. Matthews: May we take a short recess for three or four minutes? I have a number of witnesses whom I may be able to excuse.

The Court: We will take a short recess.

GEORGE T. VAN VALKENBURGH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews: 896

Q. Mr. Van Valkenburgh, on October 6th last, were you a stenographer in Comptroller Craig's office? A. Yes, sir.

Q. Did the Comptroller on that morning dictate a letter to you which you later transcribed and which is now Government's Exhibit No. 2 (handing paper to witness)? A. Yes, sir.

Q. About what time in the morning was this letter dictated to you? A. Around between 9:30 and 10, nearer 9:30.

Q. And when did you transcribe it? A. Immediately after the Comptroller finished dictating it. 897

Q. How many copies did you make when you originally transcribed it? A. One yellow carbon copy.

Q. What did you do with the original, which is Exhibit 2? A. As soon as I finished transcribing the dictation I took the letter to the Comptroller in the Committee on Finance & Budget room, where they were about to hold a meeting.

Q. What did you do with the carbon which you made? A. Why, I probably directed that that be

898 filed with other traction papers. No, I am a little bit wrong about that. I had not done anything with the carbon up to that time.

Q. Well, we will trace up the original first. After you got into the committee room what occurred with respect to this letter? A. I handed this letter to the Comptroller for signature and he asked me to read it aloud to other members of the Board of Estimate & Apportionment who were present.

Q. Did you read it? A. I did.

Q. Did you then hand it back to the Comp-
899 troller? A. Yes, sir.

Q. Did he sign it? A. He did.

Q. And did he then give it back to you? A. Yes, sir.

Q. Did he give you any instructions as to what to do with it? A. No instructions except to have the letter press-copied and immediately delivered to Commissioner Nixon.

Q. Then what did you do with the letter? A. The letter was press-copied, and I am not sure that I handed it to a messenger to be delivered or whether Mr. Kerrigan handed it to him, one or the
900 other handed it to the messenger to be delivered. I am not sure whether I did it or not.

Q. At what time of day was that? A. Well, it was after 10.

Q. Did you see Mr. Kerrigan that day before you took the letter in to Comptroller Craig? A. He may have been sitting in his room, I don't just recall now; I think he was. Whether he was there when I went in or not I am not sure, but he was there when I came back.

Q. Immediately on returning from the committee room, then, with the signed letter, Mr. Ker-

901

rigan was there, and one or the other of you sent it by messenger to the Public Service Commissioner? A. Yes, sir.

Q. Now, tell me what happened to the carbon which you made. A. I handed the carbon copy to Mr. Kerrigan at that time.

Q. At or about the time the original was dispatched? A. As I recall it, at the time I was coming back from the Comptroller, because I came right straight through from the committee room to Mr. Kerrigan's room, and then from Mr. Kerrigan's room to my own.

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Q. Were you instructed by the Comptroller to give the carbon to Mr. Kerrigan? A. No, sir.

Q. Was it your usual practice and custom to hand Mr. Kerrigan carbons of important letters sent out by the Comptroller? A. If it was an important matter of public interest, yes, sir.

Q. That was pursuant to your usual course of business and your regular duties? A. Well, and using a little of my own knowledge.

Q. And Mr. Craig left that to you? A. Yes, sir.

Q. And you had done it before in other instances? A. Why, very often I might call Mr. Kerrigan's attention to some letter which I thought was of importance.

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Q. And you then called this carbon—handed this letter and the carbon to Mr. Kerrigan? A. I handed the carbon to Mr. Kerrigan; that is my recollection.

Q. That, I understand, then, was pursuant to the routine and regular course of business in the Comptroller's office? A. In important matters.

Q. Was this an important matter? A. It seemed so to me.

904 Q. Do you know what was done then with the carbon copy of the letter you gave to Mr. Kerrigan? A. Mr. Kerrigan retained it. What took place after that I could not say.

Q. Did you make, or participate in having made, carbons of that carbon copy—so-called flimsies? A. I do not think I made any extra copies of it. I think those were made by one or two other copyists in the office there at the time.

Q. At your direction? A. I do not think so. I think Mr. Kerrigan directed that. I do not recall
905 of my directing any copies being made.

Q. Did you see the copies after they had been made? A. What copies do you mean, sir?

Q. I mean the flimsy copies? A. I may have seen the office copy laying in the basket on the desk afterwards, yes.

Q. Do you know what went with those flimsy copies? A. What went with them?

Q. Yes; for what purpose they were made, and then what happened to them? Whether they were sent out of the office or remained in the office? A. I do not exactly grasp what you mean.

906 Q. Well, did you send them over to the City Hall? A. No, I did not.

Q. Did you know of their having been sent over to the City Hall? A. Yes, sir.

Q. Of your own knowledge? A. Yes, sir.

Q. At what time, as nearly as you can fix it, were they sent over? A. That I could not say; possibly around half past 12 or 1 o'clock, something like that.

Q. What time did you go to lunch that day, if you recall? A. I always go to lunch at the time the Comptroller goes out. I wait until the Comptroller leaves for lunch and then I go to lunch, so

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as to be back when he returns to the office.

Q. Well, were these sent out before you went to lunch that day? A. They must have been.

Cross Examination by Mr. Mooney:

Q. Who was present in this room where you took the letter in and it was read? A. Why, I cannot recall exactly; most of the members of the Board of Estimate and Apportionment.

Q. Well, it was a regular session, was it? A. A regular session of the Committee on Finance & Budget. 908

Q. Of the Board of Estimate and Apportionment? A. Of the Board of Estimate and Apportionment.

Q. And you know, do you, that they were then engaged in the official work of the Government of the City of New York? A. Yes, sir.

Q. I show you a paper that has been marked here 14 for Identification, which has been submitted here by Mr. Haag, the Secretary of the Board of Estimate and Apportionment, who was here and probably testified during your presence in the room. Did he? A. Yes, sir.

Q. And he produced this paper while you were sitting here waiting to be called? A. Yes, sir. 909

Q. And you believe it to be authentic, do you? A. Yes, sir.

Q. Now, referring to this paper, I will ask you whether a reference to these names serves to refresh your personal recollection as to who were present on that occasion (reading): "John F. Hylan, Mayor; Charles L. Craig, Comptroller; Michael F. Laughlin, President of the Borough of Manhattan; Edward Riegelmann, President of the Borough of Brooklyn; William J. Flynn, Acting President,

910 Borough of The Bronx; Maurice E. Connolly, President of the Borough of Queens; Frank X. Sullivan, Commissioner of Public Works; John E. Bowe, Acting President, Borough of Richmond. I will ask you whether those gentlemen were then all present, according to your best recollections? A. To the best of my recollection, they were all present.

Q. It says here, "Comptroller Honorable Charles L. Craig presided." Is it your recollection that he was presiding at the time? A. Yes, sir.

Q. And how is that indicated? Does the presid-
911 ing officer sit at the end of the big table or at the middle of the big desk? A. The middle of the big table.

Q. And is that where the Comptroller was sitting on that occasion? A. Yes, sir.

Q. And when this paper was read, was it read by you yourself? A. Yes, sir.

Q. Did you read it in a loud voice? A. Yes, sir.

Q. And in the hearing of all of the gentlemen? A. I did, sir.

Q. And the session was then in progress, was it? A. Yes.

912 Q. They had started business and you brought the letter in and the letter was then read and read aloud while they were then engaged in official business, was it? A. Yes.

Mr. Matthews: I do not get the difference between your questions and the witness' answers. I do not know to what portion of your questions his answers apply. You should make them a little shorter to give him time to answer.

913

Q. When the letter had been read, were some statements or comments made by those present within whose hearing it was read? A. I cannot repeat exactly what was said, but it was commented upon very favorably.

Q. And was it then signed by the Comptroller? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. And after it had been read and right there in that room; is that correct? A. Yes, sir.

Mr. Mooney: That is all.

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Re-direct Examination by Mr. Matthews:

Q. What time was it when you got your letter completed and went into the Board room, the Committee room? A. Well, it is hard to remember the exact time of all those things, but I should say it was between 10 and 10:30 pretty close to 10:30, possibly.

Q. And the meeting started that morning, as was the custom, at 10:30?

915

The Court: What time did the meeting start?

The Witness: Some of those meetings are called at 10 and 10:30; at different times, when they are making up the main budget.

Q. 10:30, it says in the minutes here. A. That is probably correct, sir.

Q. And the moment before you took the stand I asked you a few questions and I understood you to tell me that when you got in and read the letter, the business meeting had not commenced. A. Well,

916 of course, I could not say what they had been discussing when I went in there with the letter to be signed. I was asked to read it. It was not my business to stop there and see what the committee was doing, but whether they had started the work on the official budget, I do not know.

Q. I thought you told me that they were assembling when you got in there? A. I don't recall that.

Q. Well, is it a fact that they were assembling, or that they had assembled then? A. I may have
917 said that they were all assembled there.

Q. Is it a fact that they were assembling, or were they all present and all in their seats when you got there? A. They were all present, yes.

Q. Were they all in their seats at the table? A. Some of them might have been standing up; the others had taken their seats.

Q. Do you recall that the Mayor was there, seated? A. Yes, sir.

Q. And that the Comptroller was there, seated? A. Yes, sir.

Q. Do you recall that Mr. Loughlin was there,
918 seated? A. Yes, sir.

Q. And had Mr. Riegelman come in at the time you got there; do you recall him distinctly? A. I am quite sure he was; yes, sir.

Q. And Mr. Flynn; did he come in? A. Yes, sir.

Q. Was Mr. Connolly there? A. Yes, sir.

Q. And Mr. Frank X. Sullivan? A. Yes, sir.

Q. And Mr. John E. Bowe? A. Yes, sir.

Q. You recall, distinctly and independently as to each one, that they were all present? A. All of them, with the exception of President Riegelman,

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and I never bothered very much whether he was around or not.

Q. Did you make a note of the comments of the letter, as they were made, after you finished reading it? A. No, sir.

Q. Was a note made at that time of the comments? A. Not to my recollection.

Q. Was it a part of the work of the Budget Committee? A. No, sir.

Q. Was it a matter that should or would have gone into the official minutes of that Committee? A. No, sir.

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Q. Can you recall independently, and as to each of the gentlemen present, what comments each separate one made on the letter? A. I could not very well, no; except that it was generally favorably commented upon.

Q. Do you recall what Mr. Bowe said about it? A. I do not.

Q. What Mr. Sullivan said about it? A. No, sir.

Q. What Mr. Connolly said about it? A. No, sir.

Q. What Mr. Flynn said about it? A. No, sir. 942

Q. You do not recall whether Mr. Riegelman was there? A. Not absolutely certain, but I presume he was there; he is noted on the record as being there.

Q. I mean at that time; you were not present up to the exact time at which he appeared there? A. I am very positive that he was there.

Q. Do you recall what he said? A. No, I do not.

Q. Do you recall what Mr. Loughlin said? A. No, I do not.

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Q. Do you recall what Mr. Craig said, if anything, in addition to what you have already testified? A. I do not, except that I read the letter and the Comptroller signed it.

Q. And told you to dispatch it? A. Yes, sir.

Q. You recall nothing further? A. No, sir.

Q. Do you recall what Mayor Hylan said? A. He said it was great stuff.

Q. Anything further? A. No, sir.

Q. Now, do you recall whether he said anything futher or not? A. I do not. I could not begin to

923 think of exactly every thing that happened. Of course, there was a general discussion and a general approval of the communication.

Q. And that is as nearly as you can recall at this late day just exactly what did happen? A. It is, yes, sir.

Q. The discussion took up some appreciable portion of time—a few moments? A. It took up a few moments.

Q. Can you approximate how long it lasted? A. I did not think this letter would have become of such great importance at that time, or I would have

924 tried to remember it a little better.

Mr. Matthews: That is all.

Mr. Mooney: That is all.

LINDLEY M. GARRISON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Garrison, are you the Receiver in the case of the Brooklyn Rapid Transit Co., for the Brooklyn Rapid Transit Co.? A. I am.

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Q. When were you appointed? A. 31st of December, 1918.

Q. Was that a permanent appointment or a temporary appointment? A. Temporary.

Q. When were you appointed Permanent Receiver? A. My impression is, the 15th of January, 1919, but I am not positive.

Q. And did you, after you were appointed Temporary Receiver, take possession of the properties of the corporation for which you were appointed? A. I did.

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Q. And was your appointment extended from time to time to other companies? A. It was.

Q. And did you, as your appointment was extended, take possession of the properties of those companies? A. I did.

Q. Did you serve at all times as Receiver down to and including October 6, 1919? A. Yes.

Q. While you were acting as such Receiver, did you at any time deny to any official or any member of the municpial government, meaning by that the Government of the City of New York, any access to information in your hands as Receiver?

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Mr. Mooney: I object to that as incompetent and also upon the ground that it involves conclusion.

Overruled; exception.

A. I did not.

Mr. Mooney: Does your Honor understand my objection of its being incompetent? If you do not, I had better perhaps, amplify it. I intend thereby to include the objection that information communicated to

928 the officials of the City of New York does not in any sense come up to that requirement of proof which is required in a criminal case with regard to the defendant who is now on trial. We are assumed to proceed here with some observation of those rules which apply to a person charged with a criminal offense, and I assume, even if this is somewhat summary in its nature, I can imagine no more harmful evidence than evidence of this kind, character and description, by which a crime
929 is intended to be imputed to a single officer, than by asking generally whether another in an official capacity has denied access to an aggregation of individuals constituting the City Government. If my word "incompetent" does not convey that to your Honor's mind, I trust you will include that now within the objection and consider this as a motion to strike out the answer upon the grounds that I have stated.

The Court: I adhere to my ruling and deny the motion to strike out.

930 Mr. Mooney: I except.

Q. Have you at any time had an application from Mr. Charles L. Craig for access to any of the information in your possession as Receiver? A. I have no recollection of such, but I cannot deny that I had. I have received a great many communications and I do not carry them in my mind.

Q. Have you at any time denied any such application? A. I have not.

Mr. Mooney: Now, I make the same objection as heretofore; and your Honor makes the same ruling?

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The Court: The same ruling.

Mr. Mooney: I except.

Q. Have you at any time denied an opportunity to Mr. Craig to ascertain the truth with respect to the properties in your hands as Receiver?

Mr. Mooney: I object to that as involving a conclusion and as not included within the information.

The Court: I sustain the objection.

Mr. Matthews: The objection was sustained, sir? 932

The Court: Yes. I am following the letter. The letter reads, "deny to myself and other members of the Board of Estimate & Apportionment any access to original sources of information concerning the property and affairs of various public utility corporations holding franchises to operate in the City of New York." There may be some other references in the same subject-matter elsewhere, but my eye does not catch it.

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Q. Has there been, Judge Garrison, any policy of the Receiver of denying to Comptroller Craig access to original sources of information concerning the properties and affairs of the corporations in your hands as Receiver?

Mr. Mooney: I object to that as incompetent and improper, and as involving a conclusion, and not the proper way to prove a negative, if such is intended, either as to form

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or substance. By the term "incompetent" I wish to embrace therein what I said before.

The Court: I will sustain the objection.

Q. Will you state, Judge Garrison, what the policy was of the Receivership, from the time you were appointed Receiver up to and including October 6th, with respect to affording access to members of the Board of Estimate and Apportionment to original sources of information concerning the properties in your hands as such Receiver?

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Mr. Mooney: I object to that upon the grounds heretofore stated, and upon the ground that in a proceeding of this character we are not to consider policies, but acts.

The Court: Overruled.

Mr. Mooney: And that it calls for the operation of the witness' mind. I except.

A. I cannot answer it, Mr. Mooney, without using my mind. The policy was to afford the fullest opportunity to the Board of Estimate and Apportionment, the Mayor and the Corporation Counsel, and the Comptroller, to all the records—not being technical in the word "records"—but all the papers and documents and accounts in my possession as Receiver.

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Mr. Mooney: I move to strike out that answer as containing incompetent matter; containing matters which involve conclusions, containing matters that involve the Comptroller in relation to other persons and officials; and in addition to that, upon the ground that the answer of the witness as to the policy is not within the terms of this in-

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formation, nor has it any relation to the crime charged against the defendant.

The Court: Denied.

Mr. Mooney: I except. Does your Honor understand by what I have said that I intended to include and did include in the grounds of my objection that the answer does not contain any act or fact. If not, I embrace that.

The Court: I understand.

Q. I wish you would state, Judge Garrison, what was done to carry out the policy of granting complete access to the records in your hands? A. Every time that anybody came to the offices and the matter was in any way referred to me, my instructions to my subordinates were, "Give them the fullest access." 938

Q. Did you have any conference at any time with any representatives of the City? A. Oh, yes.

Q. With what representatives?

Mr. Mooney: I shall object to this if it is not directed against this defendant. We might just as well understand that my theory of the defense of this proposition, whatever the theory of the prosecution may be, we might just as well have the law distinctly marked. You cannot convict a man of criminal contempt by showing that somebody else identified with the City Government has been given information, I take it. 939

The Court: I will sustain the objection.

By the Court:

Q. Let me ask, at any time did you deny to Mr. Craig any access to original sources of information

919 concerning the property and affairs of the public utility corporations holding franchises to operate in the streets of New York, in respect of which you were, from the time of your appointment to and including October 6, 1919, Receiver? A. No.

Q. And I will enlarge that question by not confining it to access to original sources of information, but to any information? A. The answer is the same, no. In other words, I did not deny access to any particle of information that I had in my possession.

920 Q. Did you deny to any member of the Board of Estimate & Apportionment access of any kind to original sources of information concerning the property and affairs of the various public utility corporations holding franchises to operate in the streets of New York, with respect to which you were Receiver, and that question is to comprehend the time when you were appointed such Receiver to and including the 6th day of October, 1919? A. No.

Mr. Mooney: That, I submit, is incompetent and not proper as against the defendant.

921 The Court: Overruled.

The Witness: The answer is no.

By Mr. Matthews:

Q. I wish you would state, Mr. Garrison, the offers of access to records and information in your possession that were made by you to representatives of the City Government. Do not answer until Mr. Mooney has had an opportunity to object, if he wants to.

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Mr. Mooney: I object to it on the ground that any offer to any official of the City Government, other than the Comptroller, who is an official of definite powers and duties and acts within his own sphere, would be incompetent in a prosecution against the defendant.

The Court: Well, I will sustain the objection the question as framed, but I will allow the question if it is limited to the Comptroller and all other members of the Board of Estimate & Apportionment.

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Mr. Mooney: We will except to that, your Honor. Even that would not be competent and arguable.

Q. Will you state what, if any, offers or proffers of access to information in your possession you made to any member of the Board of Estimate & Apportionment during the period from your appointment down to and including October 6, 1919?

Mr. Mooney: May I ask a question voir dire?

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The Court: Yes.

By Mr. Mooney:

Q. Have you ever spoken to Mr. Charles L. Craig, Comptroller of the City of New York, in your life? A. Oh, yes; I have been talking in this Court room since I am here.

Q. Prior to that did you enjoy speech with him? A. We had a very short colloquy in the meeting of the Board of Estimate & Apportionment in December of 1919, while the Board was in session, and I

946 think that is the first time I ever saw Mr. Craig. I assume he knew who I was, but it was just a mere colloquy. I was appearing there as Receiver.

Q. In any case, it is a fair statement that you had no oral communication with him on the subject to which the question relates that has just been put to you? A. Not only a fair but a comprehensive statement. I never saw Mr. Craig to know him until that day in December, and then the oral talk was a colloquy about some petitions passed at the public hearing here.

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Mr. Mooney: Then I now frame an objection, in view of the voir dire, because any communication, if any, must be in writing, and, if so, the writing must be produced.

The Court: Yes, the counsel will produce it.

By Mr. Matthews:

Q. Did you have any communication with any
948 member of the Board of Estimate & Apportionment, in writing? A. I will have to ask a question, if I may.

Q. Yes. A. You mean either addressed to them as a body or individually?

Q. Addressed to them either individually or officially. A. Before the 6th of October?

Q. Before the 6th of October? A. I do not recall any such.

Q. Did you have any conference with any member of the Board of Estimate & Apportionment prior to the 6th of October? A. Yes.

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Q. With what members did you have a conference? A. With the Mayor.

Q. And when did you have a conference with the Mayor?

Mr. Mooney: I object to that as immaterial, what happened with the Mayor.

The Court: I will take it.

Mr. Mooney: Yesterday's proceedings were productive to all of us.

950

A. I did not intend to volunteer anything. In January of 1919.

Q. I wish you would state the substance of what was said by you and by the Mayor.

Mr. Mooney: I object to that as incompetent.

The Court: Sustained.

Q. Did you at that time offer to the Mayor complete access to any information in your profession?

Mr. Mooney: Object to that as incompetent.

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The Court: Sustained.

Q. Did the Mayor make any request of you for information, or access to your records as Receiver?

Same objection; same ruling.

Mr. Matthews: Will the Court not let me go into this at all? Is it that it has nothing to do directly with the Comptroller?

The Court: Yes; I think testimony as to conversations, at this stage of the trial,

946 think that is the first time I ever saw Mr. Craig. I assume he knew who I was, but it was just a mere colloquy. I was appearing there as Receiver.

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Same objection; same ruling.

Mr. Matthews: Will the Court not let me go into this at all? Is it that it has nothing to do directly with the Comptroller?

The Court: Yes; I think testimony as to conversations, at this stage of the trial,

952 not with the Comptroller, are not admissible.

Mr. Caffey: The statements made by the Comptroller in his letter to the Public Service Commission and the charge by Mr. Craig is that there has been a denial to "myself and other members of the Board of Estimate and Apportionment of any access to original sources of information concerning the property and affairs of utility corporations." The Comptroller in this letter
953 does not confine the charge or the denial of access to himself, but he embraces other members of the Board of Estimate and Apportionment. I submit to make relevant any occurrences between the Receiver and any other member of the Board of Estimate and Apportionment which had any bearing upon information that the Receiver might furnish members of the Board of Estimate and Apportionment—

The Court: The witness has testified that at no time did he deny access to original
954 or other sources of information to the Comptroller, or to any member of the Board of Estimate and Apportionment. That, as I have already ruled, is admissible; but at this stage of the proceedings conversations with any other than a member of the Board of Estimate it seems to me are not admissible, and I will so rule.

Mr. Matthews: That will be all, then, under the Court's ruling. You may examine him, Mr. Mooney.

Cross Examination by Mr. Mooney: 955

Q. Mr. Garrison, were you appointed Receiver by Judge Mayer? A. Yes.

Q. And were you continued as Receiver by Judge Mayer? A. Yes.

Q. Referring to the alleged contemptuous communication, the paragraph thereof reading as follows: "When the applications were made Judge Mayer in the friendly proceedings instituted by those interested in these corporations for the appointment of a Receiver of their own liking, if not 956
of their own selection, the Corporation Counsel of the City of New York," and so forth—now, I will ask you, were you appointed Receiver in a friendly proceeding? A. I do not know anything about the appointment of the Receiver.

Mr. Matthews: I object.
The Court: I will let the answer stand.

Q. Did you not know of the character of the proceedings the nature of the proceedings, at the time that you were appointed? A. No, sir.

Q. Did you have any conversation with anyone 957
with reference to your appointment before you were appointed?

Mr. Caffey: Immaterial and irrelevant.
The Court: I will allow it.

A. I did.

Q. With whom? A. With Mr. J. Horace Harding.

Q. With whom else? A. Nobody.

958 Q. And for whom did Mr. Harding speak? A. I have no idea. He was a client of the office.

Q. Did you attend before Judge Mayer before you were appointed? A. No, sir.

Q. Do you know how you came to be appointed? A. I do not.

Q. Well, you had never been appointed by Judge Mayer before, had you? A. No, sir. You mean as Receiver?

Q. Yes. A. I never was appointed anything by Judge Mayer before.

959 Q. Well, that answers the question. And it must have been a good deal of a surprise to you when you were appointed?

Mr. Matthews: I object to that.

The Court: Sustained.

Mr. Mooney: I submit that question is quite competent and proper, in view of the statement referred to in this letter. It might not ordinarily be so, and I do not wish to impress it upon you if your mind is made up upon it. I do not regard this

960 examination as having to be conducted along very narrow lines, in view of the fact of the experience of the witness and the experience of all of us in the mundane affairs that surround us—well, I will ask you were you surprised when you were appointed?

Mr. Matthews: Same objection.

The Court: Same ruling.

Q. Did you know that the Judge handed down, in connection with your appointment, a felicitation to the public of the City of New York that a

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man of your business and experience and general activities should have been induced, in substance, to accept the receivership; did you know of that?

Mr. Caffey: I object to that; absolutely immaterial.

The Court: Sustained.

Mr. Mooney: Well, of course, if this is the way this examination is going to go along, I am going to stop. I suppose that is my privilege, any way, but if this is the way, the responsibility of it rests very largely upon my learned friend, if they are going to shoot in every time I ask a question —I see they are both lined up at their bench again, the same as yesterday, when their favorite son was examined—if this is the way the examination is going to be conducted, with a volley of objections to protect these noted individuals from examination along these lines, I might just as well say now that I am not going to go very far in it. I want to know, and I state it broadly and absolutely, I am entitled to know, in view of the charge against my client with respect to this letter, I am entitled to know the circumstances and the surroundings of the appointment of Mr. Garrison as Receiver of this company, and I impress upon the Court, regardless of the form of my questions, our desire and our feeling that we are right in eliciting that information.

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Mr. Matthews: Mr. Mooney is asking questions which by no means are proper cross examination. They do not test the

964 credibility of the witness, they do not cross him on anything that was asked him on direct. Furthermore, they go far beyond the issues of this case. The information is clear; the charges are plain, and if he wants to cross examine a witness on the charges and on the issues, or to bring out from him anything that will have a bearing either upon his testimony on direct or upon the the issues in the case, no objection will be made. The two questions that have been
965 asked go back and antedate the appointment of the receiver.

The Court: I am perfectly clear.

Mr. Matthews: I have got no objection to Mr. Mooney having the information, but I do not want to make this trial a mere rehash of everything that appeared in the press relating to these Receiverships from the time they began down to the present time. I think we should confine ourselves to the issue.

The Court: I am perfectly clear as to
966 the rules of evidence, I think, and I rule that I can see no objection to either counsel interposing objections when the other counsel is examining.

Mr. Matthews: And the matter of my standing at the bar is merely for the sake of convenience, so that I can hear better. It is very difficult to hear sitting back at the table, particularly when Mr. Mooney is between me and the witness.

Mr. Mooney: Your Honor's ruling stands, I understand?

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The Court: It does.

Mr. Mooney: In view of your Honor's ruling, I abandon my cross examination.

The Court: Very good. We have to adjourn now, because I have another matter on at five o'clock, unless there should happen to be some short witness who wants to get away, or something of that kind.

Mr. Mooney: I would like to be courteous and agreeable, but if your Honor is of the mind to adjourn, let us adjourn. We have come to the end of a busy day; let us ad- 968
journ.

The Court: We will adjourn until Monday at 10:15.

Adjourned to May 17, 1920, at 10:15 A. M.

New York, N. Y., May 17, 1920. 10:15 A. M.

JOB E. HEDGES, a witness called on behalf of the Government, being duly sworn, testified as follows: 969

Direct Examination by Mr. Matthews:

Q. Mr. Hedges, are you the Receiver of the New York Railways Company? A. Yes, sir.

Q. When were you appointed? A. March 21st of last year and confirmed Permanent Receiver on March 31st of last year.

Q. From March 21st down to and including October 6, 1919, were you acting as the Receiver of the New York Railways Company? A. Yes, sir.

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Q. Did you as Receiver have possession of the properties of the New York Railways Company? A. Yes sir.

Q. And of their records, books and papers and so forth? A. Yes, sir.

Q. Have you at any time denied access to the information in your possession concerning the New York Railways Company to Charles L. Craig? A. No, sir.

Q. Have you denied access to that information to any member of the Board of Estimate and

971 Apportionment? A. No, sir.

Q. Have you denied such access, or access of any kind, to original sources of information, or any other kind of information whatsoever, in your possession as Receiver, to Charles L. Craig? A. No, sir.

Q. Have you denied such access to Charles L. Craig in his official capacity as Comptroller or as a member of the Board of Estimate and Apportionment? A. No, sir.

Q. Or in his private capacity as a citizen? A. No, sir.

972 Q Have you denied such access to such information to any member of the Board of Estimate and Apportionment? A. No, sir.

Q. Has there been any policy adopted or carried out by you, as Receiver, of denying to Charles L. Craig access to original sources of information concerning the property and affairs of the New York Railways Company?

Mr. Mooney: We object to that, your Honor, upon the ground that it is incompetent and involves a complexity and a series of conclusions.

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The Court: Overruled.
Mr. Mooney: I except.

A. I have not.

Q. I ask you the same question with respect to other members of the Board of Estimate and Apportionment?

Same objection; same ruling; exception.

A. I have not.

Q. I ask you the same question with respect to Mr. Craig, enlarging it to embrace not only original sources of information concerning the property, but all sources of information within your possession concerning the property? 974

The Court: Or any information?
Same objection; same ruling; exception.

A. Well, I answered the question as to my policy. I have not.

Q. I ask you the same question with respect to other members of the Board of Estimate and Apportionment? A. I have not. 975

Q. What has been the policy of yourself, as Receiver, and those acting under you, with respect to furnishing information to the Board of Estimate and Apportionment and its members?

Same objection; same ruling; exception.

A. I have directed all subordinates in the New York Railways to furnish all information sought by any member of the Board of Estimate, and have

976 made that promise openly in the Board of Estimate.

Mr. Mooney: I don't know just how to raise the objection to a general answer in that way other than—

The Court: This promise that you refer to was after the 6th of October?

Mr. Mooney: Then I move to strike it out.

The Court: Strike out that part of the
977 answer.

Q. My questions I intend to limit to the period from your original appointment down to October 6th, not covering beyond October 6th. A. Yes; I appreciate that.

Q. Now, have any of your answers except this last one embraced matters subsequent to October 6th, or are they all applicable to the period down to— A. (Interposing) They are all applicable.

Q. (Continuing) October 6th but not passing that date? A. Absolutely.

978 Q. Will you state what information has been furnished or what offers of information have been made by you as Receiver to members of the Board of Estimate and Apportionment during the period from your appointment down to and including October 6th?

Mr. Mooney: May I ask under *voir dire*, whether any communication has been had except in writing?

The Witness: I don't recall for the moment.

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Mr. Mooney: Then I object, your Honor. The writing should be produced.

The Court: Communications of any kind till October 6th were in writing?

The Witness: I think all of them are; I cannot speak specifically.

The Court: Well, that is your best recollection?

The Witness: That is my best recollection.

980 Q. Mr. Hedges, do you recall the entry of an opinion or memorandum by the court in the New York Railways receivership, on or about September 6, 1919 (handing document to witness)? A. I do.

Q. Is the paper I handed you a copy of that memorandum? A. Yes, sir.

Q. When was that memorandum brought to your attention? A. Why, within a day or two prior to September 8th; two or three days prior to that.

Q. What, if anything, did you do with respect to that memorandum when it was brought to your attention? A. On September 8th I signed and addressed to the other receivers three letters, which I directed my secretary, Mr. Anderson, to have delivered to the Mayor. 981

Mr. Mooney: Don't let me be rude; you are in the middle of a sentence, but since we have interrupted, I object to any statement with respect to the Mayor. This objection is very much more than formal. There is no identity, either in law or in fact, between the defendant on trial and the Mayor of the City of New York, and I submit that serious

982 injury is likely to occur to my client by the introduction into this record of matters relating to the Mayor or relating to the City of New York, as an entity separate or distinct from the Board of Estimate and Apportionment. I have given serious thought and reflection to this point, and I urge it with as little wordiness as is necessary to present it but with all the earnestness of which I am capable.

983 The Court: The only point I see is this—the letter of the defendant says, "denied to myself and other members of the Board of Estimate and Apportionment any access," and so forth. Now that takes in both the defendant and the other members of the board. Now, if this testimony is calculated, as I assume it is from my familiarity with this particular witness, to show that what you already know of the so-called Stone-Webster report, or the court's memorandum, any of which, with respect thereof, was communicated to the various members of the Board

984 of Estimate and Apportionment, it is admissible. What I will do is, I will take the testimony of the witness and reserve the motion to strike out any part later.

Mr. Mooney: Supplementing what I have said, your Honor, it is a fact in the administration of the great affairs of this city and its diverse capacities, that a matter that would or might come to the attention of an individual who occupied one relation to the city government would not come before him when occupying another. This argument is

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no tweedledum and tweedledee at all, but is made in very great earnestness—that information communicated to the Mayor, or other individuals, who, acting as Mayor, would observe, or reflect, or cogitate upon it or pass it by as the occasion required in the administration of his functions as Mayor, would assume an entirely different relation and an entirely different aspect when that same individual came to perform his duties as a member of the Board of Estimate and Apportionment; or, to be precise—because I 986
have been warned of this as one unacquainted with the details of the administration of these offices—a communication sent to the Mayor of the City of New York, or a communication sent to the City of New York, if it related to those matters that would come up before the Board of Estimate and Apportionment, would, from the very weight of the material that is called to the attention of the different offices, be laid aside without any want of respect to the sender of the communication, and would not be a 987
matter of thought or care or attention with respect to those related to the Board of Estimate and Apportionment, or to membership therein, until such time and under such circumstances as the matter would come up positively and directly in the Board of Estimate and Apportionment.

Now, the Comptroller's letter was written and was designed, as far as human thought could frame a speech, to relate to himself and to the members of the Board of Esti

988 mate and Apportionment in their capacities as such and strictly as such. I assume, from my own familiarity with this matter that a great deal of information was conveyed to that evanescent entity known as the City of New York, who may have been a clerk of no great dignity and no greater appreciation or standing. I have a belief that certain material went to the Mayor; I have a certain belief that certain material went to the Corporation Counsel. Now, if you are going
989 to assume in such a serious thing as a contempt proceeding that any of that material either came to or was accessible to this defendant, I think that you will be doing him a very serious injustice and one which your own familiarity with the great affairs of state should guard you against.

Now, it is a fact—without putting anything more than a negative fact on the record—it is a fact in the common experience of all of us that no communication addressed to the Mayor, or addressed to the city,
990 would come to the knowledge of my client, nor would it come to the knowledge of the Board of Estimate and Apportionment, which has a calendar, and anyone who attempts to interfere with that calendar, or with the due performance of the business calendar of the Board of Estimate and Apportionment, gets into serious trouble, including such penalty as he suffers from the Sergeant at Arms.

Now, I don't want to take a narrow view of this matter, but it is an important matter, and if my client is going to be buried

991 under a vast lot of material addressed to other departments of the city, he will be seriously injured, and to give point to my remarks, to which I am now addressing myself, I want to point out to your Honor that the ruling you have just made, or have indicated that you are about to make, whichever it may be, has failed to show an appreciation of the point that I am making, namely, that in the narrowest way in which I am presenting the point, no information that goes to the Mayor, no information that 992 goes to the City of New York, under such designations, would either in law or in fact come to the attention of either Mr. Craig himself or of any member of the Board of Estimate and Apportionment.

The Court: I will let the witness answer. You may reserve a motion to strike out. I have made a note of it.

The Witness: I directed my secretary, Mr. Anderson, to have delivered personally to the Mayor and the two Public Service Commissioners, Mr. Delaney and Mr. Nixon, this 993 memorandum which was sent, as I understand in a signed letter. Then I directed him to have mailed to each member of the Board of Estimate and Apportionment, the same day, a copy of this paper which you handed me.

Mr. Mooney: I move to strike that out, your Honor.

The Court: Denied.

Mr. Mooney: I except.

The Court: Better have this marked for identification.

994 Mr. Matthews: I ask that the paper be marked for identification.

Marked Government's Exhibit 26 for identification.

Mr. Mooney: I might be accused here of being unfair if I did not point out to your Honor that the answer is complex and in its latter part relates to the act of another and, as such, of course, it is hearsay, so that you have before you now two objections.

The Court: Yes; I understand.

995 Mr. Matthews: You may examine him.

Cross Examination by Mr. Mooney:

Q. Mr. Hedges, you were appointed by Judge Mayer, were you? A. Yes, sir.

Q. And was your appointment made permanent? A. Yes, sir.

Q. And so that we may have a statement on this record of what the New York City Railways, of which you are the Receiver, the New York Railways Company, of which you are the Receiver, is, visually or in fact, will you please tell us what that
996 is? A. Is or was?

Q. Well, either way? A. It was all the green cars operated on Manhattan Island. It is a few that are left.

Q. That is, it has been disintegrated, has it? A. Yes, sir.

Q. And the green cars served the East Side largely, didn't they? A. They did; yes, sir.

Q. And because of the people that it served and because of the district through which it went, the discontinuance of the cars brought out a good deal

of turmoil and bitter complaint, didn't it? A. Yes, sir. 997

Mr. Matthews: I move to strike that out.

Mr. Mooney: That is in the writing. You might as well bring it out by him as by a dozen other people.

The Court: I think it is irrelevant, but it has been answered and I will let it stand.

Q. If all had gone well, as you hoped it might when you became Receiver, it was your hope and desire to continue to operate the green cars and the other properties within your charge as a part of a unified system, wasn't it? A. Yes, sir. 998

Mr. Matthews: The same objection.

The Court: The same ruling.

Q. Now, with respect to the subject matters upon which you were examined, namely, your directions to furnish information, and so forth, I will ask you whether that came from your simple duty as Receiver, from experience that you had had, or from a prompting, an unusual prompting of your head or heart? A. You mean the sending of the report? 999

Q. No, not the sending of the report. The report is printed. A. I don't get your idea, Mr. Mooney.

Q. Well, let me put it to you very simply. You said, "I directed that information be given." Now, did that come from the simple performance of the duty of a Receiver, did it come from experience that you had had, or did it come from the prompting of your own head or heart? A. All of them and something else.

1000 Q. Well, what was the "something else?" A. The court.

Q. Well, you mean you heard and read what the court had said? A. Oh, yes.

Q. Now, of course, you've been practicing for a good many years, haven't you? A. Yes, sir.

Q. And did you know that another court, sitting where his Honor did when you heard him say these things, had directed the same thing and that his purposes had failed utterly? A. I don't remember that.

1001 Q. Did you believe that any formal direction, if this was a formal direction, would be carried out in spirit by such men as were interested or had been interested in running green cars? A. You mean the people subordinate to me?

Q. Yes. A. I did.

Q. You continued in your employ the same men who were there, didn't you? A. Many of them.

Q. And was Morehead a member? A. You mean the Dr. Morehead?

Q. Well, I don't know whether he is a doctor; he might be anything by this time. I mean the in-

1002 famous Morehead? A. I don't know any such person.

Q. Don't you know any man who sold the books of the railway companies for junk? A. I don't know him.

Q. Was Sayer in your employ? A. I gave my directions to the heads of the departments.

Q. And who was the head of the department? A. I gave my directions to Mr. Hedley, to Mr. Samison, the accountant, to Mr. Quackenbush, and the treasurer, and all the heads of the departments.

Q. Well, did you know that Mr. Quackenbush

had taken the position in the Thompson investigation that he would not allow any roaming through his books? A. That had nothing to do with it. I had heard that such— 1003

Q. You thought he would be a new man under Mr. Hedges, did you? A. I thought he would do as I told him to.

Q. With the reservation— A. (Interposing) With no reservation.

Q. You are speaking with great frankness, as I know you want to, but did you really cherish the thought and the hope and the expectation that Mr. Quackenbush was under your direction going to alter the thought and the habit of mind which he expressed, as you know something of, before the Thompson Investigating Committee? A. Yes. 1004

Q. Well, you are a marvelous man, Mr. Hedges. We always regarded you as such and I regard you now as such more than ever. You are a man above men. Well, then, you did really feel that your administration of this road was going to produce a different result than you knew of from your knowledge of public affairs in connection with street railways? A. I hoped it would.

Q. You hoped it would, but in the endeavor to carry that out you did intend that there should be an access of the kind and quality which his Honor had noted in his memorandums and in his public utterances? A. Absolutely. 1005

Q. So that I may shorten your examination in that respect, you had no other instructions than such as we can read in the record, had you? A. No. You mean that I had never had any communication with anybody on that subject than the Court, outside of that direction?

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Q. Well, you've enlarged my question; I was rather keeping— A. (Interposing) I only asked you so as to be sure to answer anything you want.

Q. Let me frame my question again because the suggestion communicated might lead us astray. Had you any intructions or did you give any instructions other than as were in line with the recorded utterances of his Honor? A. None.

Q. So that you were carrying out a duty, is that it? A. Yes.

1007 Q. Now, in carrying out that duty, or in the course of the execution of your duty, you encountered a feeling or disposition on the part of some of these officials whom your instruction would have served, that made you feel that no good could be served by any hope or expectation of co-operation, didn't you? A. You speak now of the officials under me or the city officials?

Q. The city officials? A. I don't know as to that. My thought was to present all I could and make an application for relief, and get it if I could.

1008 Q. Well, there came a time during your administration, prior to October 6th, where you felt that you were being hindered, and you felt that your efforts were being frustrated by the officers of the Municipal Government, didn't there? A. Well, speaking generally, I don't know that that is so. I did not feel much encouragement from the public utterances of the Mayor.

Q. But you went very much further. You are not the kind of a man who would make an attack upon the whole government because of the public utterances of the Mayor are you? A. Oh, no.

Q. While you might be somewhat distressed in some direction, when it came to making charges you would be more or less specific, wouldn't you?

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A. Very apt to. I handn't seen any encouragement that would lead to any mental ecstasy about it.

Q. Do you recognize this as having been said by you September 11, 1919 (reading): "And now as between the trust imposed on me by the court and the general public, which is the sufferer, because there has been no assistance given to the Receiver by the local authorities, the responsibility can rest where it belongs." Do you remember saying that in substance? A. Sounds very familiar.

Q. Now, didn't you realize that from that attitude on your part that your subordinates would take a slant or line in accordance therewith? A. On the contrary. 1010

Q. Did you think they would treat your observations chaotically? A. I thought and assumed they would treat my observations—I assumed they would take that as it was. They would read that in the papers and take my directions from me, and I assumed that they knew, as I had told them, that we should continue to do all we could, no matter what was said or done by anybody else to justify relief.

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Q. Do you remember speaking of hypocrisy in the same connection? A. I rather assume I did; I don't recall the particular instance.

Q. Now, Mr. Hedges, perhaps I had better give you the phease. It is an epigram and if I don't give you enough of it, why, ask me for more. You ended up a sentence with the words "where hypocrisy does not take the place of intelligence." Now, that, of course, was directed against the local government, wasn't it? A. Why, it must have had some reference to them; yes, sir.

1012 Q. And, of course, if this record was not entirely for local consumption people might not quite understand, but the real truth of the matter is that it was intended to indicate that the Board of Estimate of the City of New York, having the power to deal with the question of fares, were dealing hypocritically with it and not intelligently—isn't that a free translation of your epigram? A. Why, quite so.

Q. Well, now, did you believe—of course, it isn't with a man like you, to drop into the vernacular
1013 —but did you believe that when the master, when the Receiver was delivering himself of such statements as that, that his man, such as Mr. Hedley had come to be—of course, you know Mr. Hedley, don't you? A. Oh, yes; I met him several times.

Q. Did you believe that such a man as Mr. Hedley and others that you have named would accord to the Board of Estimate and Apportionment the information which you had directed them to give? A. Absolutely.

Q. You did believe it? Well, it certainly would have been a great pull along the lines of duty as
1014 against the inclination of the boss, wouldn't it, meaning there by "the boss" the head man, yourself? A. I don't know as to that.

Q. Did you think, when you made that expression, that you were expressing your own feelings or those of the Court's as you understood them? A. Without any question, I was expressing my opinions.

Q. Well, of course you did know that at or about that time the Court, without attempting to quote him literally and without attempting to inject into the record but what will be there hereafter, in form or shape, you do know that the

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Court himself made some animadversions upon the conduct of the local government with respect to the railway situation? A. Yes.

Mr. Matthews: I object to that.

The Court: Sustained.

Mr. Mooney: I except.

Mr. Matthews: I move to strike out the answer.

The Court: Strike it out.

Mr. Mooney: I except.

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Q. Now, did you, prior to the 6th day of October, do anything with reference to furnishing access to original sources in your possession? A. Oh, yes.

Q. Did you do anything more than the direction that you have testified to, or to give the direction to which you testified? A. Why, I was in frequent consultation with all the heads of departments from the time I went there, and I told all of them that the only possibility of any change of attitude or relief was an entirely open matter toward the public officials and had to be done.

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Q. Well, you did realize, did you not, that the City of New York was interested in several aspects, without entering into all of its relations, you knew that they were interested in the question of the books and accounts, the franchises and the figures and all, because of their varied relations to the taxpayers and to the government, didn't you? A. I assume so.

Q. You've been receiver before, haven't you? A. Once or twice.

Q. Do you know of any effective means of obtaining information with respect to properties that

1018 are in the hands of a receiver other than by individual acts as to original sources by the person seeking the information? A. Why, that is the best method.

Q. You were present at the conference that was called by Mr. Nixon, the Public Service Commissioner, weren't you? A. Yes.

Q. And you heard the letter read which is the subject of these proceedings? A. Yes.

Q. And do you remember saying on that occasion, "All this is in good spirit because I know every-
1019 thing said here this morning will be in the papers this afternoon; every word of it will be said in the papers to-morrow morning." Do you remember that? A. Yes, in substance; yes.

Q. And you made that apparently from some experience that perhaps everybody does not possess, because that was after the reporters had been excluded; do you recall that? A. Yes.

Q. So that your experience in public affairs, in affairs of this community, were that, notwithstanding the exclusion of the reporters, that it would all get in the papers? A. Yes. There were twenty-
1020 five or thirty men in the room, as I recall it.

Q. Do you personally believe, Mr. Hedges, speaking as a witness and laying aside your official character, that any man or a set of men could agree upon a change in the terms of a franchise, basing their information only upon an expert accountant's report like that of Stone & Webster—when I said "franchise" I meant public franchise, street franchise? A. Yes, I think they could if they would read it and study it.

Q. Do you know, or do you believe, or do you think that this matter of Stone & Webster allocat-

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ed the stealings which we all know from public investigations within the last quarter of a century, the admitted stealings; do you know whether Stone & Webster put them on one side of the account or another?

Mr. Matthews: I object to that.

The Court: Sustained as immaterial to this inquiry.

Mr. Mooney: Well, your Honor, they put in Stone & Webster's report. I would not like to pass that by without calling attention 1022
to it. I must be allowed some leeway with that and I would like to make this suggestion. I do not wish to be dispersive, but I would like to make this suggestion to you becausce it is worth consideration, I think. These proceedings are summary proceedings. They are, according to all the authorities, to be conducted otherwise than in strict conformity to any practice or procedure that is laid down, or, as Chief Justice White said,

"While they are in a certain sense above the law they always move within the law." 1023
Now, they are expressly described as summary proceedings and in the nature of affairs they are not to be circumscribed by those rules of evidence which are applicable in an ordinary litigation between parties. Do I seem to be branching out?

The Court: Well, I thought so.

Mr. Mooney: Well, then, I will stop. The time will come, your Honor—

The Court: I consider the question inadmissible for two reasons: first, that in this

1024 inquiry the merits or lack of merits in the Stone & Webster reports are entirely immaterial and, secondly, the opinion of the witness in respect thereof is entirely immaterial.

Mr. Mooney: Well, without elaborating, your Honor, this is not attacking the Stone & Webster report. Let everybody in this courtroom get out of their heads that I am making a charge, or intend so to do, or that I am going to elaborate or going to branch out. Every question is intended to be put,
1025 however ineffective I may be doing so, from the standpoint of such learning and intelligence as I possess as a member of the court; but I think it would be plain to anyone that when the witness is called to testify with respect to directions which he gave out, and then is put in evidence an account of these experts, the question recurs not upon the accuracy or sufficiency of the Stone & Webster report but as to whether, in the knowledge and belief of the witness he was giving out—because that is what he is called for—he was
1026 giving out this information, it were possible for the public to ultimately get that information it was necessary for them to have to make up their minds on the point that anyone was interested in having to make up their mind, namely, upon their official duties with respect to a rehabilitation or reconstruction. Now, this inquiry cannot, I submit, be kept within any such narrow limits as that. A witness has his say upon a certain point and there the inquiry stops.

It seems to me that it is of the utmost consideration—it will be, I hope and I think,

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before you get through—to know whether Stone & Webster put, we will say, the $900,000 item in Construction Account or whether they put it in some other account, not because you are here to try out that question but because a public official of the City of New York could not understand this account until he knew, if he could ever find the scraps from which to construct his knowledge, whether the $900,000 item, which has been the subject of this investigation, and therefore is within your knowledge and ju- 1028
dicial experience as a judge, whether that was on one side of the account or the other. Now, it seems to me that it is material for me here to show—and if these doors are to be closed, after I have made as intelligent an explanation of it as I can—if these doors are to be closed, it should be with the knowledge on your Honor's part of what I am attempting to show by the witness. I am not trying to attack tiny, little bits of paper or tiny little things such as expert reports are, because, after all, we know them to be a 1029
mere aggregation of figures; I am trying to reach the very point of the letter which is claimed to be contemptuous here, as to whether a public officer could or could not get any intelligent appreciation of the figures except from access to original sources. Now, this case seems to revolve very largely about that point. Your Honor seems to be of the impression, so far as your judicial utterances disclose, you seem to be of the impression that original sources are such as an

1030 expert can hand out. Our insistence is, as firmly and as strongly as we can make it, that original sources mean the ability for a man to go in and search and find and discover, and there never has been an investigating committee yet appointed and a public officer yet appointed who has been able to get into the original sources of these street railway companies; and if anybody has any idea that on a judicial order or the say so of a receiver, however weighted it might be, the
1031 people were to be afforded information, that that was equivalent to access to original sources, it will fall far short of human experience in this town.

Now, I say in my examination of Mr. Hedges I am entitled to know what he believes; a question of his perception; it is a question of whether he believes, when this Stone & Webster report went to these people, as to whether such great items as I have spoken of, that are in your Honor's mind and all of us, whether they have been on one side or
1032 the other. He says that he not only gave these instructions but he believed they were going to carry them out; and my object is to show that no one, except from that fondness of duty which a receiver gets in the performance of his duty, that no one could indulge the fond belief that the City of New York was to get access to this item of $900,000 and find out whether it was put into Construction Account or—

The Court: All that you have said in my opinion is quite beside the case, utterly im-

material. The letter sets forth, among other things, that there must be a reversal of the policy, for which Judge Mayer is responsible, of "denying to myself and other members of the Board of Estimate and Apportionment any access to original sources or information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York." Now it is the Court's understanding that the report of experts is nothing more or less than the report of experts. 1033 1034

Mr. Mooney: Well, that is just the point.

The Court: The letter refers to a denial of access to sources of original information.

Mr. Mooney: Well, that is what the witness testified to. The witness testified that he gave the writer authority to have access to original sources of information.

The Court: The testimony was strictly confined, on direct, as it touched this subject matter to that point. Now, it is perfectly manifest that the question asked of the witness is inadmissible for the two reasons at least to which I have referred, and I adhere to my ruling. 1035

Mr. Caffey: Will your Honor hear me for a moment? Counsel for the defendant has indicated what the attitude of the defendant is toward the relevancy of evidence of the case which is here being tried. We are not in the slightest concerned whether traction companies are good or bad; we are not in the slightest concerned in the history of

1036 traction companies or with any prior controversy. We are here to try merely whether the defendant is guilty of contempt of court. The information specifies definitely five respects in which this letter is alleged to be untruthful and to be contemptuous. Whatever may be the other statements in the letter is of no concern to us, because there is no charge here except in the five respects specified.

Now, these five respects are, one, the de-
1037 nial of access to original sources of information to the defendant and members of the Board of Estimate; that is one. Now, anything that has a bearing, one way or the other, upon whether or not there has been a denial of that access by policy for which the Court is responsible, is relevant, and anything else having to do with whether or not the city had access to original sources of information, or any other kind of information as to the traction companies, is wholly irrelevant. Reference has been made
1038 by Mr. Mooney to the Thompson investigation. We are not the slightest concerned with anything that occurred in the Thompson investigation. This letter charged that this court was responsible for a policy of denial to the city officials, the defendant and other members of the Board of Estimate and Apportionment, of access to original sources of information.

Now, the relevancy of this Exhibit 26 for identification is this and this only—that in the memorandum of the Court the Court's officials were directed not merely to furnish

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a copy of this report to the city officials but were also directed to make it clear to the city officials that every facility will be afforded for the public officials and to citizens' associations to satisfy themselves in respect to the actual financial and other conditions existing with relation to the corporations now in their official charge, and the letter signed by the receivers accompanying this report, when it was sent to the defendant and other members of the Board of Estimate and Apportionment, contained this 1040
statement, and this is the part of the letter which is relevant: "At the same time we desire to state that every facility will be afforded to you to satisfy yourself in respect of the actual financial and other conditions existing in relation to the corporations now in their official charge. Manifestly, anything having bearing upon this statement in this letter, that the Court had adopted the policy of denying to city officials access to sources of information, is pertinent evidence.

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The Court: I understand that perfectly. I have not referred to the letter because thus far it is merely marked for identification. Naturally, I am familiar with the Court's memorandum and directions of the receivers and trustee, as well as with the letter of the receivers and the trustee, written in pursuance of the Court's direction.

Mr. Caffey: I will not go into the details of the other four specifications at the moment, but with respect to them, just as in respect to the first point that I have dis

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cussed, as to which the letter is alleged to be untruthful and to be contemptuous, evidence is competent, evidence is relevant, but in no other respects. Now, that is the Government's position.

Q. Did you know, in answering this letter, which has been marked for identification, the number is 26, or authorizing its sending, that in part, at least, the expert's report had to be made up from sources where one of the sets of books had been destroyed.

1043 Did you know that?

Mr. Matthews: I object to the question. It is wholly immaterial and does not come within the previous rulings.

The Court: Sustained.

Mr. Mooney: I except.

Q. Did you know that when you were sending a copy of this memorandum of Judge Mayer, and sending your letter, Exhibit 26 for identification, that in fact an entire set of books of one of the railway companies to which your letter referred,

1044 which had been referred to as the books of the corporation in one public investigation, that those had been sold to a junk dealer, and that after they had been sold to a junk dealer another official of the company had appeared before the Grand Jury of the County of New York and said that he had an unofficial set of books of the same company and had testified with respect thereto? Did you know those facts when you sent your letter and the memorandum of Judge Mayer?

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Mr. Matthews: I object as irrelevant and immaterial.

The Court: I assume these questions are to matters prior to the appointment of the Receiver?

Mr. Mooney: Yes, sir.

The Court: Objection sustained.

Mr. Mooney: I except to that.

Q. Did you know, Mr. Hedges, that there were not in your possession books, original books, and original sources from which Stone & Webster could make up their report? 1046

Same objection; same ruling; exception.

Q. Did you know that the Stone & Webster report was in large part made up from other than original sources?

Same objection; same ruling; exception.

Q. Did you know of original sources from which the Stone & Webster report was made up, so far as any books in your possession went? 1047

Mr. Matthews: Just a moment. I don't understand the question. May I have it restated?

Mr. Mooney: I am stating these questions so as not to appear to be assenting to the Court's ruling. Has your Honor got clearly in mind—do you think I have asked enough questions to develop the point?

The Court: I think so.

1048 Mr. Mooney: I am trying to be respectful, as I always want to be, but I don't want to put the questions crudely and fail to develop my point. The witness should have known or did not know anything about it that the Stone & Webster report was, in the very nature of things, largely made up upon an assumption, because the original records and original sources had been very largely destroyed. Your Honor does not feel that that is of any importance?

1049 The Court: Quite right.

Mr. Mooney: And I except.

Mr. Matthews: The point that Mr. Mooney has in mind is that back in history, before the appointment of the Receiver, certain things happened to certain records, and he is referring to records that never came into possession of the Receiver, and not to the records that were in the possession of the Court or the Receiver.

Mr. Mooney: My point is that any expert's report of the railways of the City of
1050 New York must, in the very nature of things, in the knowledge of every man in this matter, it must be a fictitious report, with all due respect to Stone & Webster, because the evidence does not exist except so far as it can be reconstructed from loose memorandums, because most of the books were sold as junk and the other set of books is admittedly a bogus set; and therefore any report of Stone & Webster or anybody else to a man familiar with the railway situation in the City of New York, is not worth the paper it is written on. I say that with due

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respect to everybody here, but I feel that we should not be a lot of boys. You cannot make up a set of books of the City of New York because they are admittedly bogus.

The Court: The Court understands that all the references to acts alleged to have taken place prior to the receivership are wholly immaterial and incompetent.

Mr. Mooney: And we except to that.

The Court: Anything more, Mr. Mooney?

Mr. Mooney: There isn't anything left after that ruling.

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HENRY L. STIMSON, a witness called on behalf of the Government, after being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Colonel Stimson, from the appointment of the Receiver in the New York Railways Company case down to October 6, 1919, were you at any time counsel to the Receiver? A. I was counsel from the time that he was confirmed; I think that was about April first, if I am not mistaken.

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The Court: March thirty-first.

The Witness: March thirty-first.

Q. By "confirmed" you mean his appointment was made permanent? A. His appointment made permanent; yes.

Q. And you served from that time down to and including October sixth? A. Continuously.

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Q. During the time you were counsel to the Receiver, did you at any time, as the Receiver's counsel or otherwise, deny to the defendant any access to original sources of information in your possession, as counsel to the Receiver?

Mr. Mooney: I object to that as incompetent, your Honor.

The Court: Overruled.

Mr. Mooney: Exception.

1055

A. I did not.

Q. Did you deny such information to any member of the Board of Estimate and Apportionment? A. I did not.

Q. Now, I have asked you with respect to original sources of information. Have you denied access to the defendant to any sources of information in your possession?

Same objection; same ruling.

A. By "denial" you mean, of course, on request from them?

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Q. Yes? A. I did not.

Q. That question was as to the defendant himself. I ask you the same question with respect to other members of the Board of Estimate and Apportionment. Did you deny to any one of them any access to any information? A. I did not.

Q. Have you appeared in court in connection with the proceedings from time to time in connection with the New York Railways Company? A. I have.

Q. Have you been present in court in connection with these proceedings when the Corporation

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Counsel's office was also represented in court? A. I have.

Q. Have you observed the Corporation Counsel, personally or through his assistants, take part in the proceedings called by the court, make arguments and file papers in connection with those proceedings?

Mr. Mooney: I object to that as incompetent, and so as to elaborate the point, it is particularly incompetent because the Corporation Counsel of the City of New York is neither the representative of nor the official or other means of communication with the Comptroller of the City of New York, the defendant, and neither in law or in fact would any communication thus made to the Corporation Counsel pass to or bind or become known to the defendant. 1058

The Court: I will sustain the objection at this time.

Q. Do you recall, Colonel Stimson, along early in the receivership the appointment by the court of experts and accountants to make certain investigations and reports on the New York Railways Company's financial situation? A. You mean Messrs. Stone & Webster? 1059

Q. Yes? A. I do.

Q. And I believe there is also a firm of accountants? A. Price, Waterhouse & Company?

Q. Yes? A. Yes, I remember.

Q. Do you recall preparing instructions for the accountants and the experts, and the accountants making up this report? A. I do.

1060 Q. Will you state whether or not a draft of those instructions to be given by the Receiver was furnished by you to the Corporation Counsel before they were finally given?

Mr. Mooney: I object to that, your Honor.

The Court: I will take that only for the purpose of identifying the papers and marking them.

Mr. Mooney: Well, now, so that this
1061 should not proceed along these lines with any seeming acquiescence on my part, and to keep the matter within its proper channel, I wish to point out that the course which the learned District Attorney is pursuing is to build up and to buttress his Stone & Webster report, and that your Honor is ruling, if I understand your rulings right, that I cannot break down the Stone-Webster report. One man may build up and I am not allowed to break down.

The Court: Well, I will allow that par-
1062 ticular question for the reason indicated.

Mr. Matthews: I don't want, if it is possible for me to avoid it, to have the question allowed in a limited way, and I will call the court's attention in a way that it will be later made to appear in this proceeding, that the Corporation Counsel, in connection with at least one of these receiverships, appeared at the express direction of the Board of Estimate and Apportionment, and conducted a proceeding or made an application to the court, and he is the legal representative of

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the city. He is the person or the lawyer upon whom the Board of Estimate and Apportionment must rely in connection with legal proceedings, and for that purpose the Corporation Counsel is the City of New York; is the Comptroller of the City of New York; is the Board of Estimate and Apportionment, in all proceedings in court.

The Court: The point is there is no evidence yet to the matters to which you refer.

Mr. Mooney: And, besides that, if there were it would disestablish the point instead 1064
of buttressing it, because in that particular instance it appears that for the purpose of making the application, which was denied and which has resulted in all this succession of events, the Corporation Counsel was acting as he only could act under an express direction of the Board of Estimate and Apportionment, and there is attached to the record, of which my learned friend has given me a bill of particulars, the resolution of the Board of Estimate and Apportionment employing him for that purpose, 1065
so that the point is excluded by the objection. Now there ought to be no doubt of what Mr. Matthews is referring to here, because others that read this record may not understand it as well as we do, that the paper to which he refers is the application made by the Board of Estimate and Apportionment through the Corporation Counsel, that Mr. Craig be appointed the co-receiver to serve without compensation. Now, that is the paper to which he refers, and that was

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upon an express resolution, as it appears by the paper itself.

The Court: I think I understand the matter. I have already ruled.

Q. Will you state, Colonel Stimson, what correspondence you had with the Corporation Counsel concerning the work of the experts and accountants; have you your file with you?

Mr. Mooney: Same objection.

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The Court: I merely take it for identification.

A. You are speaking now of written correspondence?

Q. Written communications? A. Written communications; yes. I have a copy—I think the originals have been sent to you.

Q. No, I have the copies. I think you have the originals. A. No, I have not the originals.

Mr. Matthews: It appears, if the court please, that in view of my failure to make

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it plain, that the originals of the correspondence that I desired to have identified are not here. I have copies which the witness furnished. May we proceed to have these copies identified and the originals later produced, in order that it will not be necessary to have Colonel Stimson come back again?

The Court: Yes.

Q. Colonel Stimson, did you have a conference with the Corporation Counsel concerning the report of the accountants and experts?

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Mr. Mooney: I object to that, your Honor, as incompetent.

The Court: I will allow the answer; just yes or no.

Mr. Mooney: I except to that. This is one of those instances in which the answer yes or no carries with it an element of proof, do you see? Ordinarily the answer yes or no would not carry with it an element of proof, but here it does; that is the reason I object to that as incompetent.

The Court: I think there is force in that. 1070
I will sustain the objection.

Q. Did you have a conference with the Corporation Counsel concerning the relations of the receivership, the Receiver and the attorneys for the Receiver, with the City of New York and its officials?

Mr. Mooney: Same objection.

The Court: Same ruling. I will sustain the objection.

Q. Did you have certain correspondence with 1071
the Corporation Counsel?

Mr. Mooney: Same objection.

The Court: I will allow that.

A. You mean in regard to the subject that you've just spoken of? I have had much correspondence with them on many subjects.

Q. I am now speaking with respect to the reports of the experts and accountants.

1072 Mr. Mooney: I object to that.

The Court: I will allow it solely for the purposes of identification, and with leave to move to strike out the answer.

A. I have.

Q. Have you copies of the correspondence? A. I have in my hands here some papers which speaking from recollection and without having personally compared them with the files, I believe to be true copies of that correspondence.

1073 Q. Will you state what this correspondence consists of? A. It consists of a letter from my firm—

Mr. Mooney: I think, since the witness is answering and from what he said, I think we should have the papers at this time marked for identification.

The Court: Suppose we have the papers marked for identification and then check up with the originals.

Mr. Mooney: I would not take that position were it not for the fact that there are two lines of objections.

1074 The Court: These can be marked for identification subject to verification with the originals, if that becomes necessary.

Mr. Matthews: Shall we mark the whole set of correspondence one exhibit?

The Court: Yes; I think so.

Mr. Matthews: I think that will be the better for convenience.

File of papers marked Government's Exhibit 27 for Identification.

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Q. Were the letters purporting to have come from your office, that is, from Winthrop & Stimson, letters that were prepared by you? A. They were.

Q. And were the letters purporting to have come from the Corporation Counsel, or from Stone & Webster, or Price, Waterhouse & Company, letters received by you in the regular course of business?

Mr. Mooney: I object to that, your Honor, for the ominous feature of it, if for no other; counsel is unable to follow such a qustion or conduct themselves—

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The Court: I will allow the question up to "received." Strike out "in the ordinary course of business."

A. They were.

Q. And did the letters going out from your office, signed "Winthrop & Stimson," go out at your direction? A. They did.

Q. I notice one letter there to the Receiver. I assume that your answers apply to that as well as to other letters? A. A letter to the Receiver?

Q. Yes? A. Yes. The same answer applies to that. There are in this set of papers letters which 1077 were sent by my firm to Stone & Webster and letters which they received from Stone & Webster, referred to in the letter which I wrote to the Corporation Counsel. What I mean is, the file which you have shown me includes more than correspondence directly with the Corporation Counsel.

Q. Yes, that I understand. In your letter to the Corporation Counsel you enclose a draft of a letter which had been prepared to Stone & Webster and Price, Waterhouse & Company? A. Yes, and more.

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Q. And in addition to that there are letters from Price, Waterhouse & Company and Stone & Webster to you and letters from you to them? A. Yes, there are.

Q. Did the Corporation Counsel make suggestions as to the information to be called for from the experts and accountants?

Mr. Mooney: Object to that, your Honor.

The Court: Sustained.

Mr. Matthews: Well, of course, it appears

1079 from the correspondence, if the correspondence goes in evidence.

Mr. Mooney: Now, please don't even get that much on the record.

The Court: That is the way it has been suggested. Suppose it applies now to both sides, that matters not stated in answers sound like facts but which are not proven.

Mr. Mooney: I will certainly follow the court's instruction, but I am unaware of having stated any fact.

Mr. Matthews: I will endeavor to follow

1080 the Court's suggestion. I think that is all.

Cross Examination by Mr. Mooney:

Q. Colonel Stimson, you are the man who is responsible, so far as any individual could be responsible, for the institution of these proceedings, aren't you? A. You do me too much honor. I don't think I am.

Q. Well, I don't intend to do you any honor, but you are the man who set the thing afoot, aren't you?

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Mr. Matthews: I object to that. It makes no difference whether he was or not.

The Court: Sustained.

Mr. Mooney: Well, I will ask him by reference to the record, but I don't know that we get anywhere by it.

Mr. Matthews: I understood the court has sustained my objection.

Q. You went to a conference, didn't you, in which Mr. Nixon and others were present, with the view to a discussion of the transit situation? A. I did.

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Q. And while you were at that conference you heard the letter, which forms the subject matter of these proceedings, read, didn't you? A. I did.

Q. And when you had heard that letter read you said, did you not, that this letter should be immediately submitted to Judge Mayer?

Mr. Matthews: I object to that.

The Court: Overruled. I will allow it.

A. I certainly did.

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Mr. Matthews: In the first place, it is all in the record. Mr. Mooney put it in himself. I don't see any necessity of putting it in over again.

Mr. Mooney: I never saw a man who was so afraid to have his witnesses cross examined as you are.

The Witness: I hope the court and the District Attorney will allow the fullest cross examination.

Mr. Mooney: So do I.

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The Witness: In the light of what has been said here previously.

Q. Yes; you realize that my cross examination is directing itself to a matter of public comment and public report, don't you, in which you have been called an errand boy; you know that, don't you?

The Court: That is excluded as immaterial.

Mr. Mooney: Well, I don't know otherwise what the witness' observation meant.

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Mr. Matthews: I move to strike out the observation of the witness. It is not responsive to any question by either counsel.

Q. I thought I was helping the witness out this time. Mr. Stimson, will you kindly tell us what you meant by the observation that you volunteered?

Mr. Matthews: I object.

The Court: Sustained. I will let the observation stand and I will sustain the objection.

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Q. And when you—I don't suppose anyone wants me to read this all to you—when you said— A. (Interposing) I can state the substance if you desire it.

Q. Well, if you wouldn't mind letting me have a little bit of leeway we might make some progress. My learned friend always stands here to help me, and you help me and the judge doesn't. But you said in the course of your remarks, "I think that a copy of that letter should be sent at once to Judge Mayer." You accompanied that with a very

severe assault on the writer of the letter, didn't you? A. I accompanied it by a statement that the letter in many respects was false, to my knowledge. 1087

Q. That is a pretty serious thing with respect to one lawyer to another; it was a very serious thing and you were a chagrined and hurt man, weren't you? A. Not in the slightest.

Q. Weren't you very much interested in the success of this conference? A. I thought that the conference was an important conference, and I regretted that the representatives of the city had not been able to come. In no other respect that I know of was I chagrined. 1088

Q. But you knew the writing of this letter was the death-knell to the conference, didn't you? A. Well, it indicated that one member of the city's representatives was not coming.

Q. It meant a great deal more than that, didn't it, to you, Mr. Stimson? A. It meant nothing more to me than the failure of a conference which I thought was desirable to the interests of the city and the public and to the Receiver.

Q. But you were a hurt man when you made that observation? A. Not the slightest. 1089

Q. You don't consider that a hurt? A. Mr. Mooney, what you are saying here indicates that I personally was hurt. I had no personal interest in it whatever. I was there representing the Receiver; I was endeavoring to assist forward a conference which I thought was important, to assist a solution of a problem, but in no personal sense was I hurt in any degree whatever.

Q. Well, then, you were a thwarted man—I don't care about these adjectives very much. I want to get at the animus. You represented an

1090 interest you were being paid for, weren't you? A. I represented the Receiver, and was being paid as counsel for the Receiver, but my pay would go on, Mr. Mooney, whether we succeeded in that conference or not.

Q. Well, I don't know much about this railway business, but I know that the first duty of a lawyer is to the man that is paying him. You had a duty that you were representing there? A. I thought I had.

1091 Q. And therefore anything that hurt your client hurt you, didn't it? A. Why, in no personal sense. I would be very glad, if I understand your question—I was disappointed; I was disappointed that the conference was not successful.

Q. Well, then, when you started on your way to Judge Mayer's chambers you started as a disappointed man, didn't you? A. In that limited sense; yes, sir.

Q. Since when did you constitute yourself the guardian of the dignity of the court?

Mr. Matthews: I object.

1092 The Court: Sustained.

Q. Had you ever done a similar thing?

Objection sustained.

Q. You said at this conference that the letter had been taken down by the stenographer, didn't you? You knew it and you said it? A. I saw a stenographer sitting within two or three feet of me; yes, sir.

Q. And you made observation of that; "It has been read in a meeting here, in the meeting in

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which there is a stenographer and presumably has been taken down by him." That is your statement, isn't it? A. Why, yes, Mr. Mooney; I was very much shocked that a letter of that sort should be read in public and should be made public in reference to one of the courts of this city.

Q. But didn't you think the Court would get the shock quick enough without your help? A. Mr. Mooney, I was an officer of the court.

Q. I know, but are you general guardian of the bar? A. Not at all, sir.

Q. Are you general guardian of the court? A. 1094
I am one of its officers.

Q. Well, didn't you think that this would get to the court quick enough when you saw it taken down by the stenographer? A. I was not at all, I am not at all aware now that I was doing anything except to bring the Court's notice, to endeavor to bring the Court's notice, a matter which, as an officer of the court, I felt the Court should have before it in order that it could act advisedly.

Q. Well, did you think I am endeavoring to pay you a great compliment, or did you think that you could occupy that extremely high attitude where 1095
you could distinguish between the thwarted feelings of your client and between that high sense which you have expressed with reference to serving the Court as your sole purpose; did you think you could draw that line? A. Mr. Mooney, it didn't require a very sharp line to be drawn in reference to that letter. It made an impression which was at once reflected not only in my mind, but in the minds of other speakers.

Q. Well, but they were all railway men, weren't they? A. No, sir. The other speaker whom I have

1096 in mind who spoke to me was an officer of the court representing a receiver.

Q. But he was also a railway man—I mean, no man rises higher than his employer, does he? A. He wasn't a railway man any more than I was a railway man.

Q. Well, you were a railway man; you were in the railway pay, weren't you, in the hands of the Receiver? I don't understand these refinements. Wasn't he representing a railway interest and weren't you representing a railway interest? A.
1097 I am very glad you've asked that question. With the Court's permission I propose to answer it. I was not representing a private railway interest in any sense, according to my understanding of the situation. I was representing a fund in the hands of the Federal Court in which I, as an officer of the court, under the direction of the Court, was endeavoring to work out the conservation of that fund in the interests of not only the owners of that fund but of the people in the city and of the city itself who were interested in the administration of that property. I have at different times in
1098 my life represented private interests and have a very sharp distinction between my position in such capacity and my position when I have been counsel of the Receiver of the court.

Q. Is that the complete answer? A. I think so.

Q. Do you wish to appear upon this record as being a man of such detached or detachable interest that in the practice of your profession, that in pursuing what you say was your course there, that you could detach your mind from the fact that the physical properties of the railways and their conservation and their betterment, and the betterment

of those who were interested in them was your chief consideration; can you do that? A. I haven't found it, as I considered, at all a difficult task. 1099

Q. So that when you come into the rare atmosphere of being counsel for a receiver, you don't think that that brings you into any question of feeling for those who owned the property? A. Oh, I didn't say that, Mr. Mooney; I didn't come into an identity of interest with them.

Q. Well, we realize that there are many grades of interest. What I am getting at, Mr. Stimson, is this. Is it not one of the ethics of your profession and of mine that a man who has an interest, 1100 that in order to stir up a prosecution as against a fellow member of the bar he may be actuated by some other feeling or interest; in other words, that a man should desist from any action in which he has an interest which has a personal outcome? A. In the first place, Mr. Mooney, I didn't stir up, to use your language, this prosecution.

Q. You carried the letter? A. I tried to carry the letter. My own recollection is that I didn't. In that respect I differ my recollection from Mr. Nixon's to what he testified here, but I freely admit 1101 that I tried to get the letter and carry it.

Q. And you had been United States District Attorney for the Southern District of New York? A. I had, sir.

Q. So you knew the machinery, didn't you? A. You do me too much honor. I don't think I ever had a contempt case.

Q. Well, anyway, you knew how to go about it, didn't you? A. About what?

Q. About getting a prosecution for contempt? A. No, sir, I did not. I took this letter to the Court; rather, I discussed it with the Court. My

1102 recollection is that it was brought down by one of Mr. Nixon's messengers after I had gone down.

Q. Now, the point that I am making with you, Mr. Stimson, is this. In this controversy that had arisen you had not only expressed yourself with reference to the falsity of this letter but you had expressed yourself, had you not, with reference to the position of the local authorities, of whom Mr. Craig was one, before he wrote the letter; isn't that so? A. I don't recall that. What do you mean, sir? If you will call my attention to any—

1103 Q. The minutes of the hearing on September 11, 1919. Do you remember making some animated versions against the local authorities, of whom Mr. Craig was one? A. If that is the hearing which resulted or which was in reference to the discontinuance of the storage battery lines, I think I did at one time say that in my opinion the action which we were debating there had been due to the failure of the city to co-operate with the Receiver and the Court. If you call that criticism I think I doubtless did criticize some of the city authorities.

1104 Q. Of course, it was directed against the city authorities, meaning the Board of Estimate and Apportionment, of whom Mr. Craig was one, wasn't it? You knew that they were the power, didn't you? A. I knew that they represented the city in certain respects.

Q. What I want to get back to is, without offence to anybody, this position. We all realize that a contempt proceeding may be initiated and that it may be initiated by the Court, but as advocates we realize that advocacy is not dead and that a contempt proceeding may be inspired and it may be inspired by a person who has an interest to in-

spire it, a proper interest; and it may be inspired by a person who has been thwarted or whose client has been thwarted; or it may be inspired by a man who has already himself declared a feeling such as you have expressed, against the City Government, of which the defendant is one. Now, I ask you, under these circumstances, do you think it was right and proper and unbiased, because you are here as a witness, do you think that your position in the matter was right and proper in the matter, and unbiased? A. Why, Mr. Mooney, I can tell you that perhaps better by recalling, as I am trying to do, my feelings during that day. The conference which you have spoken of on October 6th took place, as I remember it, as a sequel to another conference, and on the suggestion of the Public Service Commissioner, Mr. Nixon, that if I who had been present at the former conference, together with the Receiver and several other of the Receivers, if we should try to get at this next conference all of the parties of every sort who were interested in the traction properties, either as receivers or as security holders, or in any way, why, he on his part would invite in Mr. Delaney, the other Transit Commissioner, and also the members of the Board of Estimate and Apportionment, in an attempt, as he expressed it, as I recall it, to get all parties around the table where they could discuss what we all regarded as a very difficult, intricate problem, and to discuss it without any bias or private opinion towards any given solution. In other words, Mr. Nixon at that time was trying to—

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Q. Excuse me, sir; I am not asking you about Mr. Nixon; I am asking you about a question of

1108 ethics. A. I am coming to that, sir; but it all bears on it.

Q. I am not going to allow you, if I can help it, to bring in a lot of extraneous evidence as to what Mr. Nixon was doing, because we say Mr. Nixon was doing nothing. Can you answer the question without bringing that in? I am asking you about Colonel Stimson? A. Colonel Stimson was there as a part of that conference in the frame of mind which I was trying to describe, as arising out of that effort instituted by Mr. Nixon.

1109 Q. Well, will you give us your mental processes and not evidence? A. I will try to. Having met in conference for that purpose we were all endeavoring to reach, so far as we could, without any other public authorities than Mr. Delaney, who was the only one that I recall that had responded to the invitation, we were trying to reach an advance or progress in the direction of the solution of this problem. I remember that a long proposition was read first of all in the meeting by the Public Service Commissioner, and he invited inquiries about it. None of us had ever heard of it

1110 before and we discussed it, so far as we could, and we asked him whether he could not give it to us in writing, with an opportunity to discuss it further. We were in the frame of mind of endeavoring to work out without bias—

Mr. Mooney: Excuse me, Mr. Stimson.

Mr. Matthews: I submit he is asked for his frame of mind.

The Court: I think the whole thing is utterly irrelevant. I have sat still because no objection has been made; it hasn't anything whatever to do with the case, but if counsel insists upon having a witness' frame of mind I shall not in any ordinary sense restrict the witness in his statement.

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The Witness: Having started I should like to finish.

Mr. Mooney: I think the examination of the witness may be conducted according to ordinary lines.

The Court: You asked him what was his frame of mind. He may finish it now.

Mr. Mooney: I submit he is not entitled, in giving his frame of mind, to state matters of fact.

The Court: Well, I have ruled. You may have an exception.

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Mr. Mooney: Exception.

The Witness: As bearing upon my frame of mind, I was there by the express direction of this Court.

Q. Had the Court suggested the conference? A. The Court had not suggested the conference but, according to my recollection, when Mr. Nixon had suggested it we had conferred with the Court and asked him whether we should attend it and carry out some important suggestions.

Q. But you knew then you were going into a conference where there might be varying and very decided views expressed on either side, didn't you? A. I knew there was sure to be a difference of opinion on the merits of the case. I didn't have any idea that there would be personal onslaughts made by either side on the other.

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Q. Didn't you rather regard your position here as a man who had been led into ambush, with reference to what you did to the Comptroller? A. Not in that sense, no. You are taking a different method of interrupting me, sir. I hadn't finished the statement that I had made. I was going to

1114 describe exactly my feeling. Having come there in that frame of mind, on the suggestion of one of the public officers of this state, the Public Service Commissioner, and by the direction of another, the Court, in an attempt to work out that solution, this letter of the Comptroller was suddenly read containing statements which to my knowledge were not only false but which were directly antagonistic to the spirit in which the conference had met, and were a direct attack, as it seemed to me be a false attack, upon the tribunal which had sent
1115 me there. I therefore at once arose, pointed out the falsity and said that that letter with those statements in it ought to be referred to the Court which it attacked. My object in doing so was that of an officer of the Court which has been attacked, to have sent to the Court the letter or the paper containing the attack on that Court. In that way I behaved in no different, according to my own intention, in no different way from what I would in any gentlemen's intercourse. If at a conference of my friends or my agents somebody should send a personal attack on me, I should not think it was
1116 out of the way for one of my friends to say that that ought to be referred to the person whom it attacked, instead of having to be first—

Q. Suppose your friend had an interest in the subject matter? A. If it was no other than the interest that you have described me as having, it would not change my views in the slightest.

Q. Not at all? A. Not at all.

Q. Did you know that Mr. Craig was a lawyer at the time that you started for Judge Mayer's chambers? A. Well, I never had seen Mr. Craig before that time. I knew he was Comptroller of

New York; I think I knew he was a member of the bar, but of that I am not sure. 1117

Q. Well, do you remember that—just to spur your recollection a little bit—do you remember that you were counsel for Colonel Roosevelt on an occasion when Mr. Craig cross examined him; do you remember that incident? A. No, sir.

Q. You don't recall that? A. To what occasion do you refer?

Q. I am trying to ask you whether you recall it? A. I don't recall it at all; I don't ever recall being counsel for Colonel Roosevelt in court.

Q. Well, now, when you started for Judge Mayer's chambers, do I understand that you started in such a hurry that you did not wait for the letter? A. No; it is my recollection that we adjourned quite late and I asked Mr. Nixon whether the letter was ready; this I am free to say; my recollection is not very distinct but I remember asking whether the letter had been copied, he having said during the course of the conference that he would have a copy made, and my own recollection is that it was not ready and that I came away without it, but of that, as I say, I am not sure. I heard Mr. Nixon testify the other day. All I can say is the best of my recollection differs with him. 1118 1119

Q. Did you, before you left, denounce Mr. Craig in unmeasured terms to Construction Commissioner Delaney? A. I did not. I don't think I have ever talked to Mr. Delaney in my life.

Q. Didn't you wait after the conference was over to express your hostility and your feelings against Mr. Craig to Mr. Delaney? A. I certainly did not.

1120 Q. I will use The Sun of October 7, 1919. I refer to this statement (reading): "Although reporters had been excluded from the conference before Comptroller Craig's letter was read, it was learned that the Comptroller's statements regarding the availability of information concerning the financial affairs of the traction companies, particularly the Interborough, were hotly combated by the representatives of that company present, and also of the New York Railways Company. Henry L. Stimson, counsel for Job E. Hedges, receiver of
1121 the New York Railways Company, was said to have been particularly severe in his characterization of the Comptroller's statements, and he is credited with having first drawn Judge Mayer's attention to the contents of the letter. Within an hour after the letter had been presented to the conference Judge Mayer issued the following order to United States Attorney Caffey: 'It is hereby ordered that the United States Attorney advise the Court by formal information concerning the conduct of one Charles L. Craig on October 6, 1919, at which time he is reported to have published or caused to
1122 be published a written communication addressed to the Hon. Lewis Nixon, Public Service Commissioner, No. 49 Lafayette Street, New York City, concerning the orders and action of this Court in a pending cause or causes. Julius M. Mayer, United States District Judge.'" "Within an hour after the letter had been presented to the conference Judge Mayer issued the following order to United States Attorney Caffey"—is that substantially correct? A. No, sir. What I think is correct is that the stenographers' minutes, which I have read over since this proceeding began, are substantially correct in their report of what I said, and I have

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no recollection of saying anything at all to Mr. Delaney or anything except what I said in that open conference on that subject.

Q. Now, do you know, and this is asking you a categorical question, do you know what time you left the office of the commission; now, that calls for "do you know?" A. I do not. Do you mean in an accurate sense?

Q. Yes, that is what I am getting at? A. No, I do not.

Q. Do you know what time you got to Judge Mayer's chambers? A. I do not.

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Q. Do you know what time the order was issued? A. I do not.

Q. Did you stay there while the order was drawn? A. I don't think so.

Q. Well, the newspapers report the fact that you went to District Attorney Caffey's office. Did you go there and draw the order? A. I did not.

Q. Did you go to his office? A. I did.

Q. On this business? A. On this business; yes, sir.

Q. Who did the typewriting? A. I don't know, sir.

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Q. Was it done in Judge Mayer's chambers or in District Attorney Caffey's office? A. What typewriting, sir?

Q. The typewriting of this order? A. I don't think I ever saw the order.

Q. Why, are you sure about that? A. No, I am not sure, but I don't think I did. Do you want to know what my recollection is?

Q. No, excuse me, Colonel Stimson. Newspaper men are not infallible, but this is a very circumstantial report. Now, you did go to District Attorney Caffey's office? A. I did.

1126 Q. Whom did you see there? A. I saw Mr. Caffey himself.

Q. And did you take a message from Judge Mayer to Mr. Caffey? A. I did; I took a copy of the letter.

Q. And so the order drawn was dictated while you were there? A. Not to my recollection; I carried a verbal direction from the judge to take the letter to Colonel Caffey, and to direct him to institute proceedings.

Q. Now, up to that time, Mr. Stimson, you knew
1127 that there had been no publication in the press? A. No.

Q. You didn't know either way? A. No; I don't think that I did know either way.

Q. I am asking you exact information. We have the time sheets of the publications here and I don't wish to go astray, and that is the reason I ask you whether you are sure? A. I don't want to go astray and I don't want to have you attempt to give an appearance that I am going astray.

Q. Well, there is no fear of that? A. There is no fear of my doing it, sir.

1128 Q. Then neither one of us is afraid of the other. Do you know whether there had been any publication of this letter before you were in District Attorney Caffey's office? A. My recollection is that I had heard while—

Mr. Mooney: I move to strike that out, your Honor.

The Witness: If you mean "know" in the sense of personal knowledge—I did not.

Q. Did you recognize the original order which is taken from the files of the clerk? A. No, I don't

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think I have ever seen that before, sir. I am stating my recollection.

Q. I know what you have said on the point of taking notice of it, but it is going to become a question of time and circumstances, and as it is only about five lines I will read it (reading): "United States District Court, Southern District of New York. United States of America, Plaintiff, vs. Charles L. Craig, Defendant. It is hereby ordered that the United States Attorney advise the court by formal information concerning the conduct of one Charles L. Craig on October 6, 1919, at which 1130
time he is reported to have published or caused to be published a written communication addressed to Hon. Lewis Nixon, Public Service Commissioner, No. 49 Lafayette Street, New York City, concerning the orders and actions of this court in a pending cause or causes. New York, October 6, 1919. Julius M. Mayer, United States District Judge." On the back: "Matter of Charles L. Craig. U. S. District Court. Filed October 6, 1919. S. D. of N. Y.," and then "16" above the line, and "505." A. Will you, in view of your last question, have the question that you last asked me read so that I 1131
can see whether I answered it under misapprehension?

Q. (Question repeated as follows: Do you know whether there had been any publication of this letter before you were in District Attorney Caffey's office?). A. When you asked me that question, Mr. Mooney, I understood it as referring to the giving out to the newspaper representatives, that you used "publication" in that sense, in that restricted sense. I answered it in that way. I did know personally of the publication of the letter at the conference.

1132 Q. Well, that was not what I asked you, Mr. Stimson, and if you will excuse me for saying so, without matching legal knowledge, the question of whether that is or is not publication is a matter of very great importance. A. For that reason I wanted to be very careful how I answered it, that is all, sir.

Q. Do I understand that your view was then as expressed now, that the reading of it at the conference was a publication? A. Are you asking my opinion?

1133 Q. I say, was it your opinion or your view then? I am not asking you as a question of abstract law. Was it your opinion or view then that the reading of that letter at that conference was a publication? A. I think it was, sir; I think that was my view.

Q. That was your view then? A. Then.

Q. Well, now, I will ask you, didn't that savor to you of an ambush that a man should be asked to come to a conference, and then when he writes a letter because of public duty and cannot get to the conference, that those who represented different views than his should say, "Well, the answer

1134 that you've sent to our conference leads you to jail and I am going to see that you get there"? A. You think it is an ambush that when a man is invited to come to a conference and writes an answer to them, to have the answer read to the conference?

Q. No, not at all, but to have a man who has an interest and a hostility, such as you have described, and only such as you have described, to have him start off, with the answer to the letter, to the Judge, to put the man in jail, don't you think that that is an ambush? A. Not in the slightest degree, sir.

Q. Did you realize, Mr. Stimson, that the read-

ing of that letter at that conference was an acci- 1135
dent? A. I did not realize that it was an accident; no, sir.

Q. Now, you know when people get lined up on one side of a case or another they get pretty strong feelings, but just assume, for the purpose of my question, whether you think this man is a false man or whether he isn't, that when he sent the letter to the conference he had no more object—

Mr. Matthews: Mr. Mooney is asking ques-
tions repeatedly here containing false as- 1136
sumptions, or certainly assumptions that are not justified by anything that has so far appeared in the record. I object to that form of question and that type of examination.

Mr. Mooney: So far as it appears in the record, I assume it is never a good objection. I don't suppose we want to keep Colonel Stimson on tap here for the rest of this hearing. I can accommodate myself to any situation that my adversary has forced me into, but it is put there as an assumed position, and we know enough of the sur-
rounding circumstances from the stenogra- 1137
pher's minutes that this paper was handed up wet to Mr. Nixon. Why Mr. Nixon read it at this meeting nobody in God's name will ever know.

Mr. Caffey: I wish to put the objection upon another ground; it is patently irrelevant.

The Court: I will sustain the objection on that ground.

Mr. Mooney: One ground is as good as another as long as it goes out.

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Mr. Caffey: I have not made so many objections here because I did not want to waste time.

Mr. Mooney: I don't think that anything is a waste that calls a man like the Comptroller of the City of New York to the bar at the instigation—because that word is a fair word to use, an "instigation"—of this witness. If ever a man should be cross-examined to the very remotest degree; and if ever my opponent should subside that it might be
1139 done, so that the world may know why one man should try to get the best of another through process of the dignity of the court, this is the time and this is the occasion, and I am astounded beyond measure at the attitude of the District Attorney, who, under ordinary circumstances, would be the first man to uphold not only the dignity of the bench by the position of the bar, because it is the bar that is on trial in the cross-examination of this witness. It is a question whether one man can go and get an interest
1140 served or a spleen satisfied by putting another upon trial for contempt of court. This question will not die.

The Court: I have ruled and I think we have had quite enough of that.

Q. Do you know, as a matter of fact, and this is a categorical question, what time you left the District Attorney's office on that occasion? A. I do not.

Q. Do you know when you first saw the letter published in the paper? A. You mean in the newspaper?

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Q. Yes, in the newspaper? A. Oh, I don't recall at all, sir. I don't recall at all.

Q. Now, when you went on the stand, Mr. Stimson, and characterized under oath, as you did at this conference, these statements of the Comptroller as being false, you did so as a man who, in addition to what has already been described, has been publicly charged in a public hearing in the City of New York by the defendant in this case, as having acted as an errand boy in carrying this letter to initiate this proceedng?

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Mr. Caffey: I object to that.

The Court: Exclude it.

Mr. Mooney: I am doing this for the purpose of showing his bias and hostility. There must be some ability to show that.

The Court: I have excluded the question.

Q. Well, I will simplify it because you are not to answer it. A. I think he charged me with being hs errand boy.

Q. It gets in anyway. This is going to be a beautiful case. These witnesses are bursting to tell the truth and whenever we are not looking at them the truth escapes.

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The Court: What was the answer?

Answer repeated as follows: "I think he charged me with being his errand boy."

The Court: Strike it out.

Mr. Mooney: You cannot strike it out of the minds of this community with all the cleansing fluid that was ever manufactured in the world.

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Mr. Caffey: The difficulty is that the questions are dressed to try a case before the Magistrate's Court. I object to the further examination along those lines.

Mr. Mooney: The witness feels badly enough for having volunteered his statement. Don't let us punish him any more.

Mr. Caffey: I object to the continual remarks made by Mr. Mooney which have no relevancy to the case.

Mr. Mooney: Don't reprove the witness;

1145 this witness is being extinguished now.

Q. Mr. Stimson, you have characterized the statements of the Comptroller in this letter as false, and you, I assume, have done so advisedly? A. You mean when I spoke before the—

Q. No; you've said it here on the stand? A. Yes; I haven't changed my view. When I heard the letter read, although I only heard it read for the first time, it struck me as containing a number of false statements. I haven't changed my opinion as to those.

1146 Q. You realize that that puts you in a rather substantial position of an accuser, don't you?

Mr. Caffey: Objected to as irrelevant.
The Court: Sustained.

Q. You know that it is upon your statement that it is false that the prosecution depends, don't you? A. Not at all, sir.

Mr. Caffey: Objected to as irrelevant.
The Court: Sustained.

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Q. You gave your answer too quick. A. I am a poor witness, I am afraid.

Q. No, you are a mighty good one. Now, is your statement as to the falsity, is it directed to any particular phrase in this letter?

Mr. Caffey: Objected to as material and irrelevant.

The Court: Sustained.

Mr. Mooney: I except.

Mr. Mooney: Why, your Honor, can he go on the witness stand and say this is false 1148
and then not allow me to examine him on that?

The Court: The question is entirely inadmissible, and nobody objected and I did not care to exclude anything not objected to. This witness' opinion or any other as to what is false is entirely incompetent; it is a question of fact.

Mr. Mooney: I do not wish to let that statement go by with any thought that the elicitation to which your Honor refers was objected to by me with respect to matters 1149
not of fact.

The Court: I meant to say no objection was made to the question by the District Attorney.

Mr. Mooney: I asked for a statement of mind but the witness proceeded to state matters of fact, among which was his statement of fact that it was false.

The Court: I think the witness answered.

Mr. Mooney: Now, so that there shall not be any question about it and so as to shorten the examination, as I understand it your

1150 Honor rules that any examination of him on the subject of the paragraphs of this letter when he then thought or has now sworn were false, is irrelevant; am I right?

The Court: I will allow any examination that goes to the question of fact. He has sworn, so far as he was concerned, no access was denied to the defendant or any member of the Board of Estimate of any original sources of information, or any information whatever, in respect of property
1151 in charge and possession and custody of the Receiver of whom he is of counsel. Now, if there is any question looking to the denial of that fact, that question is entirely relevant and material to the controversy, but if there is any question as to the witness' opinion or point of view about something, that is utterly irrelevant and utterly immaterial and incompetent. We are dealing here on this branch of the case solely with questions of fact, and in order that I may not be misunderstood, when I said that the
1152 question or questions was or were not objected to, I was referring to the fact that the Government failed to object to the question and therefore I did not desire to volunteer to exclude them. I was not referring to any objection of yours.

Q. I apply myself, in view of what his Honor has said, to that part of your examination in which you were asked with respect to a paragraph in the letter referring to denying access to original sources. Now, did you understand, in giving your

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answer to that question here, that you were being asked with reference to a statement in the letter which forms the basis of this prosecution? A. No; I answered the question on its merits.

Q. Did you recognize its relation to the letter? A. Not by notation; only in a general way, Mr. Mooney, but I answered the question on the English of the question, the merits of it, as I understand them.

Q. Did you know, applying yourself to what you understood, as you have just said here, that no man could give access to the original sources re- 1154
lating to the railway affairs of the City of New York unless he allowed a searcher to go into them; did you know that?

Mr. Matthews: I don't understand the question.

The Witness: I don't understand the question.

Mr. Mooney: I want to keep off forbidden ground.

The Witness: Will you read the question to me?

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Question repeated as follows: Q. Did you know, applying yourself to what you understood, as you have just said here, that no man could give access to the original sources relating to the railway affairs of the City of New York unless he allowed a searcher to go into them; did you know that? A. Not wholly; no, sir. I did not fully understand the question. I have not been in the courtroom during the whole of this trial and I don't quite understand what you refer to, sir.

1156 Q. Well, did you know that the books in your possession were in many respects incomplete because some of them had been destroyed and some of them were bogus books; did you know that fact?

Mr. Matthews: I object.

The Court: I will sustain the objection because I undertsand the question referred to matters, if any, prior to the receivership, and I direct counsel to ask no further questions on that. As stated by the District At-
1157 torney, you seem to have some matters here as if they belonged to the controversy which have no relation to the controversy whatever, and which should be known by counsel to have no relation to the controversy, and I direct counsel to ask no further questions along that line, to which you may have an exception if you desire.

Mr. Mooney: I except, your Honor, and your language is of such a nature that it would be a brave man who would attempt to avoid the effect of it or to trifle with it,
1158 but I would not being doing my duty to the court nor to my client either if I did not point out to your Honor that the assumption of your ruling, which is inspired largely by the District Attorney, is not the purpose or intention which I am trying to develop, and I hesitate very much to indicate to you further than I have by my questions lest I fall under the condemnation of the court, but this is in no sense what counsel has attempted to do.

May I state in one word, and then perhaps shall I proceed—may I state in a word the

very serious error into which we are falling? This is no desire on my part to try my wind. This is no flight into fancy with me. We are endeavoring to show here that the orders that your Honor made and that this witness said, with due respect, were utterly and absolutely futile. You could not give a Comptroller access to original sources by any suggestion that you were opening up to experts or to inquiry, things that might be in the books. The only way which we contend in which that could be done was by people going in and reconstructing the books. Your Honor has never heard me on this point. I don't want to have the thing go astray; it is a great, big point, and if you feel that these rulings govern it, all well and good. But just consider that for a moment. I do not want to bring Mr. Stimson back here as my witness, but will you consider for a moment—will your Honor allow me to present an argument to you which was cut short before which your Honor's mind seems to be made up upon, but which I feel, if it is outlined to you, you may have a different view with respect to altogether?

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The Court: I did not close my mind to any argument, but the question is not as to reconstruction of books or the difficulty of ascertaining what books contained or what might have been contained in missing books. The issue so far as concerns this particular feature is very, very simple. The letter says that there must be a reversal of policy for which the Judge is responsible of denying, and so forth. Now, the sole question is

1162 whether there was any such policy or whether there was any such denial, and all the rest of it is utterly immaterial and irrelevant, and the court proposes to keep, if it can, the inquiry to relevant and material subject matters.

Mr. Mooney: The point was, your Honor, and I do not wish to prolong the discussion—the point was and is, you are ruling upon a certain concept of the letter of which you have very definite ideas with respect to, nat-
1163 urally. The letter, we say, should be read as a whole, and we say this, that while the court has directed the filing of the information, the witness on the stand inspired the prosecution with a certain view of this letter in his mind, and that the court has the same view of the letter in his mind, and while it does seem as though it is almost an impossible task for one man to make another read the English language in a different way than it appears to that other, such things are not beyond possibility, if the court will listen
1164 now to the subject that has never been discussed before. It was an occasion at which I attempted to address myself to this court and your Honor made an observation, according to the stenographer's minutes, which indicated that you had read and made up your mind, and there was no reason why I should carry out a discussion along those lines. But in a very brief situation, it is this—we feel, with all due respect to the court, that if Colonel Stimson had not presented this letter to the court from the as-

pect and in the way that the words that the court is responsible for a policy that had denied access to original sources—if he had not presented that from the standpoint that it meant that the court had denied us information from the books of this railway, there would never have been any prosecution. 1165

Now, the English in this letter as we read it—and I am very serious about this and it is not ordinarily the thing to say to a court, but I am saying it because of my respect to the court and not because of any lack of respect—I say the court up to the present time has read this letter amiss, and that those into whose hands it has fallen and who have inspired the prosecution have read it amiss. What the Comptroller had in mind is as plain to a man who deals in figures as anything can be, and that was that by refusing to appoint a receiver who could search and work and reconstruct these figures, that by that fact the court had denied access to the original sources. The thing about this letter that nobody seems to understand is this question of original sources. Now, I am making an argument to you on the history of your own court. 1166 1167

Now, this thing of original sources came up before Judge Lacombe, and before these proceedings get through the opinion is going to be offered in evidence, and Judge Lacombe found that his assumption was as ineffective as your Honor's assumption turned out to be and as it ever will be. Now, the fact of the matter is that the complaint that the Comptroller made in this letter was with

1168 respect to the original sources, and as we have to sit here and as we do sit here, because we are a defendant before the court, and we listen to the stream of evidence as to what these gentlemen did or did not do with respect to accountants' reports and books when some of them were lost and the rest of them were bogus, so far as we are concerned this is entirely beside the question, and if we were the court we would say that it is not what we are on trial for and
1169 that is not what we ought to be prosecuted for.

Now, the pith of this case is that if this letter be read aright, if it be read as the English language should be construed, in our view of it and as was intended by the letter, that the moment that your Honor appointed the Receiver and at the same time said that the Comptroller should not be a co-receiver offered by the City of New York for that purpose, that because of something that you did not know and could not know
1170 unless you had the wisdom beyond all men and knew every step and knew every cranny of these ramifications; that when you reached that point you did, unwittingly it may be and undoubtedly it was, but you did unwittingly deny to the City of New York the access to the original sources, because, sir, as it will develop in this case and as is probably well known to you, and this is not a statement of fact because these things are matters of public record—it is a fact that cannot be denied—that unless a person goes to the original sources, and unless

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he does what an accountant did once before at the time when Judge Lacombe was trying to run the Metropolitan Street Railway and reconstruct the books, it is a denial of information, and I say that with all respect and still with all earnestness, because I have stated the thing from the bottom to the top, that your Honor by those things that have been put before you and put before the Court and these receivers, you have been deluded in a way that is almost monstrous to a man. You have been deluded because they don't 1172
exist there, because checks drawn out for $500,000 and $900,000 are not on the books of this corporation.

The Court: I understand it all and I adhere to my ruling.

Mr. Mooney: Well, we except. Your Honor takes into account, I presume, these remarks in adhering to the ruling; that goes without saying?

The Court: Yes.

Q. Did Judge Mayer tell you to go to Colonel Caffey? A. He did. 1173

Q. And what did he tell you to say or do?

Mr. Matthews: I object as irrelevant and immaterial.

The Court: Sustained.

Mr. Mooney: I except.

Q. Will you state the conversation that you had with Judge Mayer?

Mr. Matthews: Same objection.

The Court: I will allow that.

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A. Why, my recollection is that I told Judge Mayer of the conference and, according to my recollection, when the letter came in. It came in shortly after I arrived if I didn't bring it. I laid that before Judge Mayer. I think there were other people present who had been at the conference, though of that I am not certain. I haven't the facts very fully in my mind, but I told him that this letter had been read at the conference and that it seemed to me that he ought to know of it. I think that is all I said.

1175 Q. Well, what did Judge Mayer say?

Mr. Matthews: Same objection.

Mr. Caffey: Immaterial.

The Court: I will let him answer that.

A. Judge Mayer read the letter, and after having read it and thought it over, apparently, he directed me to take it over to the District Attorney and to give it to him, and my recollection is that he directed me to tell the District Attorney to file a presentment on the letter. I don't recall that I ever saw the order that you showed me a little while ago; again my recollection may be at fault in that, but my recollection is that it was apparently that.

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Q. Did you say anything more to Judge Mayer?

A. Nothing that I recall now.

Q. Have you tried to recall the conversation?

A. I have, since you've asked me; yes, sir.

Q. You did not repeat to him what you had said to the conference about the letter or its contents?

A. No, but I think someone else who was there told him that I had, or had told him before I got

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there, that I had spoken after the letter had been read there in substance what I had said.

Q. And what did you say? A. I don't recall that I said anything about that, although I remember the subject being mentioned by someone else.

Q. And what did that someone else say in your presence? A. I think, as I recall it, the someone else said that Mr. Stimson got up and protested against the truth of the letter, something to that effect. I am just speaking from memory.

Q. And then did you say anything when that had been said? A. No, not as far as I recall it.

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Q. Of course, Mr. Stimson, when you said, "I think that a copy of that letter should be sent at once to Judge Mayer," you had an idea in your mind, didn't you? A. I had an idea in mind that the Court should see the letter and guide himself according to the statements of the letter as it struck him. I didn't argue the letter to the Court; of that I am certain.

Q. You say you didn't argue the letter, but you certainly intended to do something when you used that observation? A. I did. I intended to have it brought to the attention of the Court, and I regarded my duty as fulfilled when I did that.

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Q. Well, I don't see what duty you had. What duty did you have?

Mr. Matthews: We have gone all over that once.

The Court: Sustained.

Q. Well, you certainly knew what the point in your mind was, didn't you; you knew that it had formed an impression on your mind that it was contemptuous, didn't you?

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Mr. Matthews: I object. I don't think the witness' state of mind is at all material or relevant.

The Court: Sustained.

Mr. Mooney: I except to that, your Honor. As I stated before, and as I suppose everyone understands, the witness is the one who inspired this prosecution.

The Court: I understand.

Mr. Mooney: There is no use in my pursuing that course any longer.

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Q. You recall these dates pretty well, do you; you know that the letter to which we are addressing ourselves was written in October, do you? A. I recall the date of the letter, yes, October sixth.

Q. Do you remember that there was a hearing before his Honor on September 11, 1919? A. Well, I couldn't recall it by date.

Q. Just look at this book. This is a pretty nice looking book. Receivership Record, Volume 2, Part 2. Do you remember stating on that occasion: "I have only to call your Honor's attention,

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because it is recent history, to the way in which that constructive effort was met by the city authorities. Although they had been warned for two years at least of what the situation was, and what the need of revenue was, and what the result would be if such revenue was not obtained, the City, through its agents, strenuously opposed that, through the voice of its Mayor in the public print, repeating statements which were wholly unfounded and untrue, and attributing the situation of this company to things that no longer existed, the payment of rentals; through the voice of its Corporation Counsel repeating charges which the

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sworn evidence before the Public Service Commission, at which his office was represented, and himself represented frequently, showed to be wholly unfounded. Every effort so far as the public authorities of this City were concerned—and I distinguish sharply from those of the State—every effort was made not only to balk an effort to keep this system together in the interest of the public welfare and convenience, but to sow in the minds of the ignorant of this City the seeds of distrust and suspicion and ill-founded attack which are bound to produce the whirlwind whenever the in- 1184
evitable occurs." Do you remember saying that (handing book to witness)?

Mr. Caffey: I object as immaterial.
The Court: Sustained.
Mr. Mooney: That is all.
The Court: That is all.
Mr. Matthews: I think that is all.

By Mr. Mooney:

Q. Give the names of the persons present in Judge Mayer's chambers when you were there, 1185
please? A. I cannot speak with absolute certainty, but I think that Mr. Sheffield, representing one of the receivers—I am rather guessing now; that is all that I can remember.

Q. Well, it was a railway atmosphere anyway, wasn't it?

Mr. Caffey: I object.
The Court: Sustained.

1186

JAMES R. SHEFFIELD, a witness produced on behalf of the Government, after being duly sworn, testified as follows:

Direct Examination by Mr. Matthews:

Q. Are you the trustee in bankruptcy of the Interborough Consolidated Corporation? A. I am.

Q. Were you the trustee in bankruptcy on October 6, 1919? A. Yes.

Q. And for how long prior thereto? A. I was
1187 appointed receiver in bankruptcy on the twenty-first of March and was made the trustee in bankruptcy by election of the creditors some five weeks later, I think.

Q. What is the Interborough Consolidated Corporation? A. The Interborough Consolidated Corporation is a holding company which owns some thirty-three odd millions of the par value out of thirty-five millions of the stock of the Interborough Rapid Transit Company, and some fifteen millions out of seventeen millions total par value issued and outstanding of the stock of the New York Railways Company. It also owns stock in the
1188 New York Transportation Company.

Q. The New York Railways Company is a corporation, or was a corporation, and still is, I suppose, operating street railway lines in the City of New York? A. Yes, known as the Green Car Lines.

Q. And the Interborough Rapid Transit Company is a corporation operating subways under the streets of New York? A. Yes, and by control, through a lease, the Manhattan elevated.

Q. The Manhattan elevated lines? From the time of your appointment—these lines run in

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and through the Borough of Manhattan? A. Yes.

Q. Both the New York Railways and the elevated lines and the subway lines? A. The subway also extends to other parts and the elevated, too, to some extent.

Q. From the time of your first appointment, that is, your appointment as receiver, did you take possession of the books and records and papers of the Interborough Consolidated Corporation? A. Yes.

Q. And did you continue in possession and custody of them down to October 6, 1919? A. Yes.

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Q. Did you, at any time after your appointment and down to and including October 6, 1919, deny access to any original sources of information in your possession to the defendant, Charles L. Craig? A. No.

Q. Did you deny such access to such information to any other member of the Board of Estimate and Apportionment during that period? A. No.

Q. Did you deny to the defendant any access to any information or sources of information in your possession during that time? A. No.

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Q. Did you deny to any other member of the Board of Estimate and Apportionment any access to any information of any kind in your possession as such receiver or trustee during that period? A. No.

Q. During that period what was the policy of yourself, as receiver, and later as trustee, with respect to furnishing information or giving access to information in your possession to members of the Board of Estimate and Apportionment?

Mr. Mooney: I object to that as incompetent.

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The Court: Overruled.

Mr. Mooney: I except.

A. The policy was to give all information that was requested and to offer to give information to anyone connected with the city authorities or the Rapid Transit Commission or the Public Service Commission.

Q. I show you Government's Exhibit No. 26 for Identification. Does that contain a copy of a memorandum filed by Judge Mayer on September 6,

1193 1919 (handing document to witness)? A. Yes.

Q. Does it also contain a copy of a letter signed by you as trustee? A. Yes, I am one of the signatories as trustee.

Q. Did you sign the original of that letter? A. Yes.

Q. When? A. It would be very difficult for me to give the exact date.

Q. Well, does the date on the letter refresh your recollection as to the approximate time? A. It was undoubtedly either on that date or possibly the day before; I don't know; I can't tell you that my

1194 signing and the date were the same day, but, of course, approximately and probably the same.

Q. Will you state what was done pursuant to the policy you have already stated to exist? A. You refer to granting information or offering information?

Q. Yes, offering access to records or sources of information.

Mr. Mooney: I assume that is to be confined to acts within his own knowledge?

The Court: Yes.

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Q. Things he did; instructions he gave? A. I instructed Mr. Fisher, who is the secretary of the Interborough Consolidated Corporation, to give the widest possible use of our offices, our books, any sources of information that were desired, to the city authorities. I asked him to transmit a similar order to Mr. Campbell, who is also the treasurer of the Interborough Consolidated, as well as the treasurer of one or two of the other companies; and the auditor was also requested to give any information that was asked, and while I am not entirely confident of the correctness of the statement, 1196
I am of the impression that in the room adjoining my room, in the offices of the Interborough Consolidated Corporation, there were members of the staff of one of the city departments having access to these books at the time.

Mr. Mooney: I move to strike that out, your Honor, the latter part.

The Court: Motion granted. The latter part is stricken out.

Mr. Matthews: That is all.

Cross Examination by Mr. Mooney: 1197

Q. Mr. Sheffield, you do know that this paper that you sent out, as you say, of which you were one of the signatories, you know that that was a mere estimate, don't you, by the— A. It was a preliminary report.

Q. And it was based upon estimates, wasn't it?

Mr. Matthews: I submit that the report speaks for itself.

The Court: I will allow it.

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A. Well, I assume that portions of it, from the internal evidence of itself, was probably based on estimates. Certainly as to future earnings they must have been based on estimates.

Q. And in some respects the railroads have been pleasantly disappointed in that respect, haven't they?

Mr. Matthews: I object to that.

The Court: Sustained.

Mr. Mooney: I except.

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Q. Well, to put it in serious language, the prognostication made by these learned experts has turned out to be fallacious, has it not?

Mr. Matthews: I object to that.

The Court: Sustained.

Mr. Mooney: I except.

Q. What is there in this paper that you say you were one of the signatories to that would be of any use to the Board of Estimate and Apportionment of the City of New York in considering whether

1200 franchises should be changed?

Mr. Caffey: I object to that as immaterial.

The Court: Sustained.

Mr. Mooney: Now, may we assume, for the purposes of this witness' cross examination, your Honor, that the same line of examination would be directed to him that your Honor has ruled out with respect to the last witness?

The Court: Yes.

1201

Mr. Mooney: And that you make the same ruling and we take a similar exception?

The Court: Very good.

Mr. Mooney: That is all.

Mr. Matthews: That is all.

LEWIS STARK, a witness called on behalf of the Government, being first duly sworn, testified as follows:

1202

Direct Examination by Mr. Matthews:

Q. On October 6, 1919, were you a reporter on the New York Times? A. I was.

Q. Did you prepare a story for the Times based on the letter from Mr. Craig to Mr. Nixon? A. I did.

Q. Did your story, based on that letter, appear in the Times of October 7, 1919? A. It did; yes, sir.

Q. Is that a copy of the Times for October 7, 1919 (handing paper to witness)? A. Yes, sir, it is. 1203

Q. At that time was the New York Times a newspaper of daily and general circulation throughout the City and County and State of New York? A. It was.

Q. What was the source of your information for the story? A. The source of my information was the letter sent out by the New York City News Association.

Q. Where is the New York Times published? A. It is published at 217 West 43rd Street.

1204

Q. In the Borough of Manhattan? A. Borough of Manhattan.

Mr. Matthews: That is all. I offer the Times, the paper in evidence.

Marked Government's Exhibit 28.

Cross Examination by Mr. Mooney:

Q. You were just an inside man writing the article, is that it? A. Well, I was an inside man; I
1205 am a general workman who was assigned to cover the story.

Q. But you did not get in contact with the story being placed outside of the Times office, did you? A. I did.

Q. Where did you get in contact with it? A. I came down to the Federal Building and attempted to learn from Colonel Caffey how long such a proceeding might take.

Q. I observe in the article that there are some observations with reference to the proceedings here in the Federal Building. Do you recall that part of it? A. Yes, I recall that newspapermen who
1206 were on the story and who met in the building here obtained that information, that is, that Colonel Stimson came to Colonel Caffey's office, with that order referred to.

Mr. Matthews: I move to strike out the answer as obviously based on hearsay.

Mr. Mooney: Well, the thing is in and you put it in.

The Court: I will allow it to stand showing what information he got.

1207

Q. Yes, I only want to show the continuance of the article. Now, the heading of the article, "Mayer to punish Craig for Rebuke," that is written by a man in the office, isn't it? A. Yes, sir; that is, I had nothing to do with the writing.

Q. You newspapermen, you don't furnish headings? A. No, sir.

Q. But the article as it is printed, after it is made up by you and put in there, that would be called an article by which Judge Mayer put Comptroller Craig off the map; that is the way that article would be described, wouldn't it, substan- 1208
tially? A. Well, I don't know whether you would describe it in that way or not.

Q. In other words, the feature of the story is Judge Mayer, isn't it? A. Well, it seems to me the feature of the story is the possibility of Comptroller Craig being punished for contempt by Judge Mayer.

Q. In other words, the idea that was conveyed to the public by your remark is that the Court was already in pursuit of the Comptroller for contempt? A. Well, if you want to put it that way, perhaps so.

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Mr. Mooney: That is all.

The Court: Court will now adjourn until May 27th, at 10:30, and will sit throughout that day, and will then adjourn, if the proceedings are still unfinished, until June 7th, at two o'clock.

Adjourned to May 27th, at 10:30 A. M.

1210

New York, May 27th, 1920, 10:30 A. M.

Met pursuant to adjournment.

Present—Hon. JULIUS M. MAYER, Presiding.

MR. CAFFEY, United States District Attorney, and
MR. MATTHEWS, Assistant U. S. District Attorney, for the United States,
EDMUND L. MOONEY, Esq., Special Counsel,
MR. R. L. TARBOX, Assistant Corporation Counsel,
1211 ELI S. WOLBARST, Esq., of counsel, for the defendants.

ALFRED A. COOK, a witness called in behalf of the United States, being duly sworn, testifies as follows:

Mr. Matthews: Before we proceed with the examination of Mr. Cook, I have another witness whom I am very anxious to excuse. His testimony has been substantially covered by the testimony of another man in the City
1212 News Association. The only thing I want to establish by him is that the takes that have been marked in evidence actually went over the City News wires, and that the takes in question were submitted to the City News office at the dates stamped on the originals, which he will produce, and I can offer those in evidence and call the witness if it is necessary.

Mr. Mooney: Perhaps Mr. Mathews, we can dispose of those questions once and forever, and thus shorten the entire examina-

1213

tion of that branch of the case. Of course, you need not answer the query: Is there any contention in this case that there was any publication to or with respect to newspapers before his Honor had issued his order for the institution of this proceeding?

Mr. Mathews: Yes, there is.

Mr. Mooney: I certainly had not apprehended it from the proofs thus far taken. If this is the contention of the District Attorney we will need strict proof along that line. I thought it was mathematically—or to be more exact—chronologically demonstrated that according to the passage of time, your Honor's order preceded the publication in the press, but if there is any dispute about that it would be better to have a decisive issue.

1214

The Court: I think, unless I am greatly mistaken, Mr. Cook's examination will be very brief.

Mr. Mathews: Yes, it will, I will proceed with it.

Direct Examination by Mr. Mathews:

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Q. Mr. Cook, are you familiar with the proceedings in the bankruptcy matter, in the matter of the Interborough Consolidated Corporation, Bankruptcy Case 26690? A. I don't recall the number of it, but I am familiar with the proceedings in the matter of the Interborough Consolidated Corporation.

Q. Are you the attorney for the trustee in that bankruptcy? A. Yes, sir.

Q. How long have you been his attorney? A.

1216

Since the beginning, May, 1919.

Q. And were you his attorney from that period down to and including October 6th, 1919? A. Yes, sir.

Q. That bankruptcy proceeding, I understand, was begun by the filing of an involuntary petition in bankruptcy on March 21st, 1919? A. Yes, sir.

Q. And the corporation was adjudicated a bankrupt on March 28th? A. Yes.

Q. At the time of the filing of the petition in bankruptcy—

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Mr. Mooney: Do I understand that you are examining him as to his exact knowledge? I understand he is counsel for the trustee and not for the receiver. If so, I can scarcely understand how he can be apprised of facts previous to this.

Mr. Mathews: There is no dispute about that.

The Witness: Yes.

The Court: That is a matter of ready record.

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Mr. Mooney: I want to say that these records with which we have been furnished with the bill of particulars are of very considerable and minute importance and it ought not to be taken for granted at all that we either wish to waive our rights in respect to the proofs of these proceedings nor as to the form of proof. For it is not our intention to—to make any waiver in that respect.

The Court: I will allow you to question him. I am quite satisfied that the Court will take judicial notice of its own files anyway.

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Mr. Mooney: Not in a proceeding of this kind, your Honor.

The Court: I think we can.

Mr. Mooney: Of course you are the judge and your Honor makes the ruling, but this is not the only court to consider the question.

The Court: I am also aware of that.

Mr. Mooney: I except to your Honor's ruling.

Mr. Mathews: These questions are all merely preliminary.

The Court: I understand.

1220

Q. At the time of the filing of the involuntary petition, I understood that Mr. Sheffield was appointed receiver? A. I get my knowledge of that from the records themselves. I did not represent Mr. Sheffield at that time.

Q. He subsequently was elected the trustee, and after that you became his counsel? A. Yes. After he was elected trustee my firm was appointed, by order of the Referee in Banruptcy, attorneys for Mr. Sheffield, and I personally had charge of the entire matter and acted as counsel. In fact I am the only member of the firm who has any familiarity with the bankruptcy proceeding at all.

1221

Q. Can you state whether or not the City of New York filed a claim in that bankruptcy proceeding, or had filed a claim prior to October 6th—

Mr. Mooney: I object to that as incompetent and immaterial.

The Court: Yes. That must be shown by the record.

Q. Have you examined the records? A. Yes, I have examined the records.

1222

Q. Down to October 6th? A. Beyond that as to whether any claim had been filed in the proceedings by the City of New York. I did that myself.

Q. Now, will you state whether or not you found—

Mr. Mooney: Same objection.

The Court: Objection overruled.

Q. (Continued) —any such claim? A. I found no such claim.

1223 Q. Has any such claim been served on you as attorney for the trustee? A. No, sir.

Q. Have you also examined the record to ascertain whether—

Mr. Mooney: I think I would not be doing my duty if I did not point out that we are taking a departure from the previous course in this respect, that your Honor has ruled quite strictly on the question of the City of New York and of other officers thereof and the Comptroller, and this question as to the claim filed by the City of New York, I submit, is not a matter which—

1224

The Court: I will take it and give you leave to move to strike out. What is your purpose.

Mr. Matthews: It is part of the general charge of the information that the City of New York did not appear, and filed no claim and applied for no relief in the bankruptcy proceedings.

The Court: Objection sustained.

Mr Mooney: I understand that is stricken out.

The Court: Yes.

1225

Q. Also that no application was made by or on behalf of the City of New York in this bankruptcy proceeding for the appointment of a co-receiver?

Mr. Mooney: I submit that would be immaterial.

The Court: Yes, that would be immaterial.

Q. Or for the selection of the trustee, joined in the election of the trustee?

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Mr. Mooney: I make the same objection.

The Court: Same ruling.

Mr. Matthews: I except. In this instance I am submitting the evidence on this point, sir—

The Court: Yes.

Q. Mr. Cook, will you state what the policy of yourself as attorney for the trustee, and of the trustee, so far as you know it, with the respect to the making available to the defendant, the Comptroller of the City of New York, either in his personal capacity or in his official capacity, access to original source of information in your possession as counsel for the trustee, was?

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Mr. Mooney: I object to that as incompetent.

The Court: Objection overruled.

Mr. Mooney: I except.

The Witness: The policy of the trustee, and mine, under his direction, as counsel, has been to make available to everybody with any interest, and to all of the officials

1228

of the City access to any document or any information in our possession or under our control.

Mr. Mooney: Now, I move to strike out that answer, your Honor, upon the ground that it is not responsive to the question, in the sense that it introduces matter which is beyond the question, and that, therefore, the objection to the question would not reach the answer, and I wish to point that out particularly; that the answer is complex

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and indefinite and incapable of separation or definition in such a way as affect the Comptroller. That was not the question put to the witness.

The Court: Motion denied.

Mr. Mooney: I except.

Q. Did you ever deny any access to the defendant to the records in your possession? A. No.

Mr. Mooney: I make the same objection. Incompetent.

1230

The Court: Objection overruled.

Mr. Mooney: I except.

Q. Did you ever deny access to any other member of the Board of Estimate and Apportionment? A. No.

Q. I ask you the same question not only with original sources of information, but to any sources of information?

Mr. Mooney: We make the same objection.

The Court: Objection overruled.

1231

Mr. Mooney: I except.

The Witness: No.

Q. Was there any order entered in the bankruptcy proceedings which had or could have had the effect of denying to the defendant access to sources of information in your possession?

Mr. Mooney: Objected to as incompetent.

The Court: Objection sustained. You are asking this witness the effect of an order.

Mr. Matthews: That is all.

1232

The Court: You may examine him, Mr. Mooney.

Cross Examination by Mr. Mooney:

Q. Mr. Cook, did you have any relation to the proceeding as to which you have testified before you were appointed counsel to the Trustee? A. No.

Mr. Mooney: Now, your Honor, I move to strike out the testimony of the witness as to all matters prior to his appointment as counsel for the Trustee.

1233

The Court: If there is any testimony as to matters at a time prior thereto it will be stricken out.

Mr. Mooney: Now I want to be specific about it, because I have a specific point in my mind, and I am quite clear the District Attorney has not presented this question cursorily or otherwise than as determinately.

The Court: I thought my ruling covered it.

1234 Mr. Mooney: My point is distinctly: That, by this witness, for the first time is put in the form of question and answer matters relating to records. Now, the record evidence that is brought in by this particular matter is record evidence which my associates and I have directed particular attention to, and as to which we require and expect strict proof, and I do not intend by any silence on my part, nor by failure to object, or to press a point with perspicacity,
1235 to allow anyone to feel that this evidence is to go in by indirection. We demand strict evidence upon the points which have been referred to by the witness in his testimony. Now it appears not only that he has given incompetent evidence over my objections, but it also appears by his answers that he has given evidence as to matters which were in existence long before he had any relation to them. On either or both of which grounds we object, and ask that the evidence be stricken out.

1236 The Court: I will strike out all testimony relating to any documents or papers which refer to any matter prior to the appointment of the witness as counsel, also any other testimony as to matters which occured prior to that time. I should construe his testimony in substance and effect as setting forth that from the date of his becoming counsel to the Trustee he never denied any access to original sources of information nor to any sources of information in his possession to the defendant or to other mem-

1237

bers of the Board of Estimate and Apportionment, and that his policy, so far as he was concerned, was to allow access to any person interested in seeking this information. I think that covers it.

Q. Now what was the date of your appointment as attorney for the Trustee? A. As I recall the formal order of appointment was the 12th of May, 1919.

Q. And the order was an order of Judge Mayer, was it not? A. No, the order was an order of Mac- 1238
grane Coxe, the Referee in Bankruptcy.

Q. Approved by the Court? A. No, I don't think it is necessary under the Bankruptcy Law, Mr. Mooney.

Q. And upon whose application were you appointed the attorney for the Trustee? A. The Trustee in Bankruptcy himself, Mr. James R. Sheffield.

Q. Were you present when he was appointed Trustee? A. I don't think so.

Q. Did you represent any creditors of the company? A. I did not.

Q. Did you have any direct or indirect relation 1239
to the bankruptcy? A. None at all, direct or indirect.

Q. Do you know that only one creditor, viz, one of the railway companies, was the only creditor that was heard or which voted upon the selection of the Trustee? A. Such knowledge as I have as to that, Mr. Mooney, would be gained from a reading of the minutes of the proceedings had before the Referee, and I think I ought to state in fairness that when I gave certain dates as to various appointments I got those dates from

1240 an examination of the records, and those dates I used frequently in preparing the petitions and other papers addressed to the Referee or to the Court. My knowledge is derived from the records.

Q. You have stated that you or the Trustee had done certain acts with respect to giving or allowing information, but your answer contained neither names nor dates. Are you able to give a single name or a single date when you directed information to be given or when the Trustee directed information to be given, with your knowl-
1241 edge? A. I can only tell you a great many.

Q. Now excuse me, Mr. Cook, I want to shorten the examination. Can you give a date or name? A. It was always the date; that was the policy pursued. I can't give you a specific date.

Q. Of course, Mr. Cook, you as a lawyer know that to answer a question which is designed to make a former answer more specific, to be met by the rejoinder of the witness that "it was always" does not allow very much further cross-examination, don't you? A. I know. But, Mr. Mooney, in addition to such knowledge as I have, as a
1242 lawyer, I also have, I hope, some common sense.

Q. I hope you have. I supposed that was a prerequisite of your admission to the Bar. A. Then credit me with it.

Q. I am crediting you with it. I am asking you to do the same. A. I have great appreciation of yours, Mr. Mooney.

Q. Do you think that is an answer to the question which I asked you: "To give me a name or a date" for you to answer "It was always." Do you think that answer is really an answer to my question? Now, to be frank, will you state

whether or not you can give me a name or a date— A. I am trying to be frank with you— 1243

Q. Can you give us a date or a name? A. My best answer to the question, Mr. Mooney, must be, that every day after the appointment of the Trustee and my appointment as counsel was the date.

Q. But you don't know a single date from any other date and you don't know of a single name from any other name— A. You mean, when any particular policy was enunciated—

Q. Or carried into effect. I am not talking 1244 about enunciation. Enunciation is one thing, carrying it into effect is another thing. A. That was the policy from the beginning and it was never changed. I can't answer that any different.

Q. But you can't give a single overt act with respect to that policy, can you? A. The only one, a single overt act—no information was requested by the—

Q. Can't you answer that question? Can you mention a single overt act? A. The only one that I personally recall where information was requested was a reply to a letter of the Corporation 1245 Counsel addressed to Mr. Sheffield, and a reply of Mr. Sheffield's to the Corporation Counsel's letter.

Q. The question was categorical? A. I haven't forgotten any overt acts.

Mr. Mooney: My question being categorical, I move to strike out all of the answer that does not respond to the question. I did not ask for information of the kind volunteered by the witness, nor was it my

1246 intention to incorporate in the record any extraneous matter—

Mr. Matthews: I call your Honor's attention—

The Court: Motion denied.

Mr. Mooney: I except.

Q. Have you answered my question fully? A. May I have the question and the answer read? (Question and answer read to witness.)

1247 The Witness: I have not forgotten any request for information. Yes, that is all. That is a full answer.

Q. Was Mr. Quackenbush retained in connection with the administration of the estate in any way? A. From the time of my appointment as counsel to the Trustee, in no way at all.

Q. Mr. Hedley? A. In no way at all.

Q. Or Mr. Shonts up to the time of his death? A. No way at all.

Q. Were any of the former officers or employees
1248 of the company continued— A. In the bankruptcy proceeding?

Q. Yes, in the employment of the Trustee? A. I know of none.

Q. Who had the books? A. The books were in the possession of Mr. Sheffield, George R. Sheffield, in the office 165 Broadway, which he maintained. H. M. Fisher was appointed his secretary. I think Mr. Fisher was also secretary of the Interborough Consolidated Corporation.

Q. Was that the bankrupt? A. That was.

Q. So that the books were continued in the pos-

session, that is the physical custody of a former officer of the company, in the way you have described? A. Well, I don't quite know what you mean by "physical custody." I don't regard them as being any more in Mr. Fisher's physical custody than they were in Mr. Sheffields physical custody. Mr. Sheffield as Trustee continued the physical possession which he theretofore had I assume as receiver. I have always proceeded on the theory, if you want to know my knowledge on the subject—that the books— 1249

Q. I did not ask for any knowledge which was not embraced in my question— A. I regard the records of the Interborough, as in the possession of Mr. Jame R. Sheffield, as Trustee— 1250

Q. And Mr. Fisher, as his representative— A. Mr. Fisher is Mr. Sheffield's employee, assisting him, Mr. Sheffield in the administration of his trust—

Q. You found him in Mr. Sheffield's employ when you went there as counsel for the Trustee, Mr. Sheffield, didn't you? A. I don't know whether he was in his employ prior to that. I found Mr. Fisher there and I frequently conferred with Mr. Fisher in regard to Interboro matters involved in the proceeding, and I found him a storehouse of information. 1251

Q. I have struck these storehouses of information myself in connection with this. I have got a couple of trucks of books. One of them that has been destroyed. A. I found them very helpful. The information has not been destroyed.

Q. Did you get information from the books? A. I constantly referred questions to M. Fisher, in the administration of the trust, Mr. Mooney,

1252 which you may appreciate, and the questions which I submitted to Mr. Fisher were answered. I have no recollection of any matter that I have called to Mr. Fisher's attention for examination in connection with the administration of the estate where Mr. Fisher has told me that any records have been lost or destroyed.

Q. I am sure he will be glad to hear this. Do I understand then that he has freely disclosed to you information in his possession? A. I think Mr. Fisher would have to tell whether he freely
1253 disclosed information. I have found up to date no criticism of Mr. Fisher in the extent to which he would answer such questions or give such co-operation as I found necessary up to the present in the administration of the trust of Mr. Sheffield.

Q. And he is still in the same position, is he? A. He is still secretary to Mr. Sheffield. Of course, Mr. Mooney, my duty, my obligation is in connection with the affairs of the Interborough Consolidated Corporation.

Q. Naturally. And this information which you have obtained from Mr. Fisher, or some of it, has
1254 that been information which has come from his personal knowledge and recollection and was not to be found in the books?

Mr. Matthews: Wait just a moment. I object to that. Read the question.

(Question read by Stenographer.)

Mr. Matthews: I don't know exactly what the question means. It occurs to me that it is entirely immaterial.

The Court: Objection sustained.

Mr. Mooney: I except.

1255

Q. Have you obtained from Mr. Fisher information that was not in the books?

Mr. Matthews: Same objection.
The Court: Objection sustained.
Mr. Mooney: I except.
The Court: Let me ask Mr. Cook—I think the question was not asked.

By the Court:

1256

Q. At any time since you have been counsel to the Trustee, so far as your personal knowledge goes, has access to original sources, or any sources—I confine the question to original sources—been denied the defendant? A. No.
Q. The same question as to the Board of Estimate and Apportionment? A. No.
Q. The same question as to inquiries of any kind? A. No.
Q. The same question as to any member of the Board of Estimate and Apportionment? A. No.

1257

Mr. Mooney: So far as your Honor's questions may be considered to have been covered by objections and exceptions already taken, your Honor will consider our position, with respect to the questions addressed by the Court, is the same as heretofore indicated, and that by our silence out of respect to the Court, we did not intend to change our course in that respect.
The Court: Quite so.
Mr. Mooney: We except.

1258

CARL M. OWEN, a witness called in behalf of the United States, being duly sworn, testifies as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Owen, you are counsel for the Receiver in the B. R. T. suit, known as Equity Consolidated Case No. E 15,347? A. I am.

Q. How long have you been such counsel? A. Since January 1st, 1919.

1259 Q. And did you continue through the period from January 1st, 1919, to and including October 6th, 1919, as counsel for the Receiver? A. I did.

Q. Do you recall a motion in that proceeding on or about January 15th, 1919, by the Public Service Commission for leave to intervene? A. I do.

Q. Were you present when the petition was argued? A. I was.

Q. At that time did the Corporation Counsel of the City of New York also appear and apply for the appointment of a co-receiver? A. He did.

Q. Was that matter heard and argued? A. It

1260 was.

Q. And the Court at that time delivered an oral opinion and subsequently filed an order? A. It did.

Q. Have you been present at the argument of motions and hearings upon applications and proceedings during the course of the receivership since your appointment as counsel to the Receiver down to and including October 6th, 1919? A. Practically all of them; yes, sir.

Q. Has the Corporation Counsel appeared in person or by assistant at any arguments or applications? A. He has.

1261

Q. Has he participated in the arguments? A. He has.

Q. And been heard by the Court? A. He has.

Q. Will you state whether or not the application for the appointment of a co-receiver made by the City of New York through the Corporation Counsel was ever at any time renewed prior to October 6th, 1919? A. I can so state, yes.

Q. Was it renewed? A. It was not renewed.

Q. Was ever any application to intervene filed on behalf of the City prior to October 6th, 1919? A. No.

1262

Q. Are you familiar with the proceedings involving the four surface railway companies in which Mr. Garrison was appointed receiver also? A. I am familiar with three proceedings.

Q. You mean three separate proceedings or three separate companies? A. Three separate companies.

By the Court:

Q. Name the three companies? A. The Nassau Electric Railway, The Brooklyn, Queens County and Suburban and the Coney Island and Brooklyn Electric Railway.

1263

Q. The Brooklyn, Queens County and Suburban, was that one that you mentioned? A. Yes.

By Mr. Matthews:

Q. Did you mention the Brooklyn Heights Railroad Company? A. I had forgotten the Brooklyn Heights. There were four.

Q. Thereafter was that proceeding in which Judge Garrison was appointed temporary receiver consolidated with the original B. R. T. Equity suit,

1264 known as Equity Consolidated No. E 15,347? A. It was.

Q. And the appointment of a Receiver was made permanent? A. It was.

Q. And has the defendant, Mr. Craig, ever been denied access by you to any original sources of information in your possession as counsel to the Receiver?

Mr. Mooney: I object to that as a conclusion and having no bearing on the issues.

1265 The Court: Objection overruled.

Mr. Mooney: I except.

The Witness: He has not.

Q. Has he ever been denied access to any information, whether original sources or otherwise, in your possession relating to the receivership?

Mr. Mooney: I make the same objection.

The Court: Same ruling.

Mr. Mooney: I except.

The Witness: He has not.

1266 Q. Has any member of the Board of Estimate and Apportionment been denied access to any original sources of information in your possession relating to the receivership?

Mr. Mooney: I make the same objection.

The Court: Same ruling.

Mr. Mooney: I except.

The Witness: They have not.

Q. Has any member been denied any—I am not limiting it to original sources—information in your

1267

possession relating to the receivership or the properties of the Receiver?

Mr. Mooney: I make the same objection.
The Court: Same ruling.
Mr. Mooney: I except.
The Witness: They have not.

Q. What has been the policy of the Receiver and of you as counsel for the Receiver, if you know, with respect to making available to the defendant, giving him access to and facilities for the examination of original and other sources of information in the possession of the Receiver and of you as counsel of the Receiver?

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Mr. Mooney: Same objection.
The Court: Same ruling.
Mr. Mooney: I except.
The Witness: The policy has been to give to the defendant the fullest acccess to all sources of information in the possession or under the control of the Receiver or of myself.

1269

Mr. Mooney: I move to strike that out as complex and involving a series of conclusions and containing no statement as to person, time or place.
The Court: Motion denied.
Mr. Mooney: I except.

Q. I ask you the same question with respect to the other and all members of the Board of Estimate and Apportionment of the City of New York?

Mr. Mooney: I make the same objection.
The Court: Same ruling.

1270

Mr. Mooney: I except.

The Witness: The same policy has been pursued with respect to all members of the Board of Estimate and Apportionment of the City of New York.

Q. In view of Mr. Mooney's objection and your failure to include a statement of facts in your answer with respect to your policy in that regard, I now ask you whether the policy which you have stated to have existed was at any time publicly

1271 stated either on the court records or the public press, or otherwise, or both? A. It was.

Q. I show you a paper, being copy of Government's Exhibit 26 for Identification, and ask you if that is one instance of the public stating of such policy?

Mr. Mooney: I object to the question upon the ground that that is not connected with the defendant and is incompetent.

The Court: I will take it subject to a motion to strike out.

1272 Mr. Mooney: I except.

The Witness: It is.

Q. Was the original of that memorandum filed by you with Judge Mayer in the proceedings of the B. R. T. as indicated there; and the other proceedings indicated there? A. It was.

Q. And did it go out to the public over the signature of the Receiver, Judge Garrison? A. It did.

Q. I am speaking now of the B. R. T. Receiver? A. It did.

Mr. Matthews: That is all.

1273

By the Court:

Q. Let me ask you, Mr. Owen, in respect to Government's Exhibit 26 for Identification, looking now at the first page of that exhibit, beginning with the words "Dear Sir:—Pursuant—" state whether you personally conferred with the Court in regard thereto? A. I did.

Mr. Mooney: Is it polite, or is it proper to make an interjection here?

The Court: Absolutely.

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Mr. Mooney: I wish to call your Honor's attention to the fact that by the question just addressed to the witness the Court is ousting itself of jurisdiction of this proceeding. Because, by that question, the Court is putting itself in the position of possessing primary information, upon subject matter which the defendant is entitled to elicit from the Court as a witness, touching the Court's knowledge as to the facts thus referred to, and that by the introduction of that evidence in the record we are confronted by a witness, who under ordinary circumstances is not sworn and cannot be examined and cross-examined, and who is in effect a silent witness against us. For that reason we wish to state that the course pursued is such as to either oust the Court of jurisdiction or to call for the designation of another judge to hear this proceeding, or for the examination of the Court as a witness. Now, I do not wish to prolong the discussion, your Honor. You probably have the thought; but I do want to say this here:

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That the situation is so unusual that the ingenuity of counsel and the research of counsel would not be able at the present time to exactly phrase or point out the objections which should be stated more definitely or more formally upon the record; but it may be stated generally in the words that it produces a situation that is prejudicial to the defendant's interests.

The Court: If it is a matter of any importance, the Court reminds to counsel, that he
1277 asked at least one witness, perhaps more, "What conversation, if any, the witness had with the Court." I recall that counsel for the defendant asked that with respect to Colonel Stimson. If the counsel for the defendant are not desirous of knowing what the witness stated to the Court and the Court stated to the witness with respect to Exhibit 26 for Identification the matter is utterly immaterial to the Court. The Court's sole purpose was to have this witness set forth fully the circumstances, so far as his knowledge
1278 went, under which Exhibit 26 for Identification was signed and any other facts and circumstances, the Court's purpose being to make perfectly clear all the facts and circumstances, the Court's purpose being to make perfectly clear all the facts and circumstances surrounding Exhibit 26 for identification. While the Court is of the opinion that the objection of counsel is of no value whatever, but as counsel has objected and as counsel apparently does not desire the information the Court withdraws the ques-

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tions and instructs the stenographer to strike out the answers if answered.

Mr. Mooney: The position of defendant's counsel, your Honor is, and has been from the time that the questions were asked and in fact prior thereto, with respect to these matters in which the Court took part that such evidence was all in line with the objection originally made and the request originally made that another judge should be designated to hear this proceeding. The position of the defendant is now and has al- 1280
ways been that he would be confronted by a silent or unseen witness, in the sense that a person is silent and unseen when that mind cannot be probed as a witness? Therefore this is no novelty. It is not a new position assumed by counsel. The point to which—

The Court: I do not desire to interrupt, but I have heard that stated a number of times, and I think that there are limits to repetition. The Court is aware of the position of counsel on the point; the Court is 1281
also aware that the Supreme Court of the United States has held that position to be untenable, and that the Court can hear a proceeding of this kind itself.

Mr. Mooney: In that case the Judge himself was not a witness to a fact that was material to the controversy.

The Court: I don't see that we gain anything by prolonging the discussion.

Mr. Mooney: Your Honor is the master of the situation. I will desist.

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Mr. Matthews: I think it not improper to state at this time that if counsel had desired to insist on the position taken, that there was a procedure prescribed in the Statute, with which he doubtless is familiar, open to him, but which was not adopted by him, under the circumstances which he now seeks to emphasize.

Mr. Mooney: The procedure was not applicable to a situation such as this. The only procedure possible was that which was

1283 outlined by one of the Judges of the Circuit Court of Appeals to which your Honor has referred. As you say the incident is closed and counsel will get nowhere without by carrying it any further.

The Court: Quite right.

Cross Examination by Mr. Mooney:

Q. Mr. Owen, wasn't the date of your formal appointment April 4th, 1919, instead of January 1st, 1919? A. The date of my formal appointment?

1284 That order of Court was April 4th, 1919.

Q. Who had appointed you before that time? A. Well, Judge Garrison asked me to serve as his counsel on January 1st, and I actually did serve and appear as his counsel, but there was no formal order entered until April 4th.

Q. Were you a member of Judge Garrison's firm? A. Yes.

Q. And did Judge Mayer sign the order for your appointment April 4th, 1919? A. I believe it was about that date.

Q. The point is Judge Mayer signed the order? A. Yes.

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Q. And you were actually acting under that appointment on October the sixth, 1919, when you attended the conferences held at the office of the Public Service Commission for the First District, as embodied in this Exhibit B, now shown you? A. Yes, sir.

Q. Were you? A. Yes.

Q. At that conference you heard the letter which is the subject matter of this proceeding read, did you not? A. Yes.

Q. And after you had heard it read you voiced the same sentiments as Colonel Stimson had 1286
voiced in the following words "I have been very glad to hear what Colonel Stimson has just said with respect to this letter"? A. Yes, sir.

Q. And you went on to characterize it as an outrageous letter, didn't you? A. Yes.

Q. Then you were biased, were you? A. Biased as to what?

Q. The letter— A. What I said shows what I was, whether I was biased or not.

Q. No, I am asking the condition of your mind. You were biased as to the letter? A. I don't know what you mean, Mr. Mooney.

Q. Well, I assumed it was a fair question, but a 1287
rather direct one. You were unfriendly to the defendant, were you not? A. No.

Q. You were not? A. No, I didn't know the defendant.

Q. Well, that was your chief grievance, was it not, that the defendant would not come to the conference so that you could know him? A. No.

Q. Well, do you mean to say that, you a partner of Judge Garrison's, knowing the situation here, that you were indifferent? A. No, I don't mean to say that.

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Q. Well, I want you to tell us whether you did, or did not, want the defendant to come to the conference? A. Well, I hoped he would come, but I didn't expect that he would come.

Q. Well, that in itself indicated a bias on your part, didn't it? A. I don't think so.

Q. When you say of a person that you hope that they will come, but you don't expect them to attend doesn't that indicate a bias? A. It indicates a thought, a judgment that—

Q. Do you differentiate? Without going into
1289 dialectics do you differentiate between judgment and feeling? A. Yes, I may have a feeling, I would like to have you present somewhere, but my judgment would be that you would not be there.

Mr. Mooney: Well, I will be very careful not to receive an invitation from you. I don't know what would happen if I got one under those circumstances.

Q. The position of the Comptroller was known by you to be opposed to the interests and the wishes that you represented, was it not? I would like
1290 you to shorten this if you can? A. I cannot answer it in that broad way, Mr. Mooney. From the public announcements of the Comptroller it was known that he was opposed to an increase in the rate of fare upon the lines under the control of Judge Garrison, and therefore opposed to the interests which we represented.

Q. You were trying to get an increase of fare were you not? A. Yes.

Q. Now did you have anything to do with the calling of the conference? A. No.

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Q. Did you confer with anybody in respect to calling the conference? A. No.

Q. Did you know upon whose suggestion or how the conference was called? A. No, not other than the printed notice which I received of the conference.

Q. You say that you did not know the defendant. Did you know that the defendant was a lawyer and a member of the Bar? A. I rather think that I have heard that.

Q. You were bitterly disappointed at the result of the conference, the breaking up of the conference, were you not? A. No. 1292

Q. Weren't you bitterly disappointed? A. No.

Q. Were you disappointed at all? A. The only disappointment that I recall was the disappointment I had in the Comptroller writing such a letter.

Q. You think the United States Court is capable, don't you, of taking care of itself and its own dignity? A. Yes.

Q. Then why should you have this disappointment or this solicitude? A. I think that any responsible citizen ought to be disappointed that the City Comptroller, the Comptroller of the City of New York, should have written such a letter. 1293

Q. You have answered my question very nicely. And it did make a definite impression on your mind, in the words you have expressed? A. Yes.

Q. You were in sympathy with the prosecution of the Comptroller in this proceeding? A. Yes.

Q. Did you represent Judge Garrison when he was an arbitrator in connection with the matter of the Railway Company? A. What Railway Com pany?

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Q. Well, I don't suppose he has been an arbitrator, technically speaking, in more than one railway. It is the New York Consolidated? A. No, I was not counsel for him in such a proceeding.

Q. Do you know of his appointment by the New York Consolidated Railroad Company as an arbitrator before his appointment as Receiver?

Mr. Matthews: I object to that.
The Court: Objection sustained.
Mr. Mooney: I except.

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Q. Did you know that he was a duly designated arbitrator for the New York Consolidated Railroad Company at the very moment of his appointment as Receiver?

Mr. Matthews: I object.
The Court: Objection sustained.
Mr. Mooney: I except.

Q. Do you represent Judge Garrison as Receiver of the New York Consolidated Railway Company? A. Yes.

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Q. Have you ever had access to the original sources of information of that company? A. I have access to all sources of information the company has.

Q. Have you ever seen in the records of the company the designation of Judge Garrison as arbitrator in the matter referred to?

Mr. Matthews: Same objection.
The Court: Objection sustained.
Mr. Mooney: I except.

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Q. Outside of this paper, Exhibit 26 for Identification, have you in your possession any written offer of information? A. Yes.

Q. Please produce it. You realize, of course, that I am talking of the Comptroller. I don't want to spend any time—

The Court: The question, Mr. Owen, is limited by Mr. Mooney to the Comptroller.

The Witness: No.

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Q. You opposed the appointment of the Comptroller as co-receiver, did you? A. No.

Q. Well you were familiar with and helped in the drafting of the answer of the B. R. T. by Mr. Yeomans, didnt you? A. No.

Q. By the word "drafting" I intend to include preparation of that answer? A. Had nothing to do with it.

Q. Did you not see it before it was presented to the Court? A. My memory of the matter is, that Mr. Yeomans handed me a copy of it in the court room at the same time that he presented a copy of it for filing.

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Q. Have you any real memory on the point at all? A. Yes, I am rather clear about that.

Q. Well, do I understand you that you do say distinctly that that was the first occasion that you saw it? A. Yes, I say that definitely.

Q. You had not seen it outside of that place when it was presented to the court? A. I think not.

Q. And that you did not directly or indirectly take part in the preparation of it? A. That is true.

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Q. Nor any one under your instructions? A. That is true.

Q. Then do you wish to leave the record in this state, that you representing the one receiver of this property had no knowledge of what position was going to be taken with regard to an application for a co-receiver until you stepped into that room, that court room? A. The position going to be taken by whom?

Q. The Brooklyn Rapid Transit? A. Yes.

Q. You wish to leave the record that way? A.

1301 Yes.

Q. Now if my question to you were changed by inserting in it the words "by anyone" instead of the "Brooklyn Rapid Transit" is your answer the same? A. Please read the question.

(Question read to witness.)

Q. The question will then be in substance "Did you have any knowledge of the position to be taken by any one with respect to the appointment of a co-receiver before you stepped into the court room where the application was heard?" A. I did.

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Q. From whom? A. Judge Garrison.

Q. And from whom else? A. No one else.

Q. Did you take part in the discussion on that occasion before the court? A. I think not.

Q. Did you file any papers on that application for the appointment of a co-receiver? A. I think not.

Q. Well you know not, you know that you didn't? A. Yes, my memory is that I did not. No.

Q. You use the word "think" and that leaves the negation without any force to it? A. Well there have been about one hundred applications

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and two hundred motions in this matter, and I don't remember all of them. But my definite memory is that I did not.

Q. But our memory is sometimes spurred by the result of our labors. You don't find the work tiresome, do you? A. Sometimes quite tiresome.

Q. Now the employees of the Brooklyn Rapid Transit, were they continued by Judge Garrison?

Mr. Matthews: I object.

The Court: Objection sustained.

Mr. Mooney: I except.

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Q. I will point my question a little bit more. Were the employees—

Mr. Matthews: I object. I think the pointing of the question cannot cure the objection.

The Court: Counsel may ask the question, and might refrain from giving the reasons for asking the question.

Q. In whose physical possession have the books and records of the Brooklyn Rapid Transit Company, of which you have information, been since you have been counsel for the Receiver? 1305

Mr. Caffey: Same objection, immaterial.

The Court: Objection overruled.

Mr. Matthews: I except.

The Witness: In the possession of Mr. Abel and his assistants.

Q. What relation did Mr. Abel have to the affairs of the Company before you were appointed?

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Mr. Matthews: Same objection.

The Court: I think it is immaterial, but I will allow it.

Mr. Matthews: Exception.

The Witness: I think the comptroller, comptroller and auditor

Q. Comptroller or auditor of the Company? A. Well, I don't know his exact designation, title.

Q. And the books and records of the company have been in his physical keeping up to the present,

1307 haven't they? A. I think so.

JOHN H. SCHWARTING, a witness called in behalf of the United States, being duly sworn, testifies as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Schwarting, were you the stenographer who reported the proceedings before a Committee of the Board of Estimate and Apportionment on

1308 October 6th, 1919? A. Yes, sir.

Q. Were you present when the adjournment was taken for lunch? A. Yes.

Q. And when the session was resumed after lunch? A. Yes.

Q. What time did the session adjourn for lunch? A. My notes show they took an adjournment for lunch at about 1:25.

Q. Did they adjourn at that time to a fixed hour? A. Yes, sir, 2:30.

Q. To what hour did they adjourn? A. To 2:30.

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Q. Did they resume the session before 2:30? A. No, sir.

Q. Can you state exactly when they did resume the session? A. No, sir.

Q. State as nearly as you can? A. About three o'clock.

Mr. Matthews: That is all.

Mr. Mooney: No questions.

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FRANK N. ROBBINSON, a witness called in behalf of the United States, being duly sworn, testifies as follows:

Direct Examination by Mr. Matthews:

Q. Mr. Robbinson, are you connected with the Public Service Commission for the First District? A. I am Assistant Secretary of the Public Service Commission for the First District.

Q. Do you recall a conference that was held on October sixth, 1919, in the Hearing Room of the Commission? A. I do.

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Q. Did you on that date give to the press a statement on behalf of Mr. Nixon? A. I did.

Q. How many papers did you hand out that day to the press? A. I prepared about fifty or sixty copies of that. Just how many were handed out I don't know.

Q. I mean how many separate documents, not how many copies? A. Two separate documents.

Q. I show you a mimeographed document, consisting of ten sheets, and ask you if that is a copy of one of the documents handed out? A. I have

1312 not made a verbatim comparison of this copy. I assume that there are some corrections in this, and I assume that the corrections are the same in the copy which I have here.

Q. Is that the copy which you produced yesterday? A. This is the copy which I produced here yesterday together with this copy.

Q. We checked over those corrections I think, and we saw that they were the same? A. I think the corrections were made, may be two or three.

Q. What time of the day did you give them to
1313 the press as nearly as you can fix it? A. About 11:30 or 11:45.

Q. About 11:30 or 11:45? A. Yes.

Q. Had the conference adjourned at that time, or had you given it out before the final adjournment of the conference? A. Yes.

Q. Did you later in the day give out a different and later statement? A. I did.

Q. I show you sheet dated October 6th, 1919, and ask you if that is the later statement which you gave out? A. It is.

Q. At about what time of the day did you give
1314 that out? A. That was some time during the afternoon, about half-past four or five, even later.

Q. In the afternoon? A. In the afternoon.

Mr. Matthews: I ask that the first document, consisting of ten pages be marked for identification Government's Exhibit 29, and that the second document of one sheet be marked for identification Government's Exhibit 30.

Papers so marked.

Q. Was Government's Exhibit 30 for identification give out by you at the direction of Mr. Nixon?

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Mr. Mooney: Are you speaking of the earlier one only?

Mr. Matthews: No, the later one.

The Witness: I believe that he prepared that himself, or assisted in the preparation of that, suggested the subject matter, but the matter is a little hazy in my mind, but my recollection is, that was prepared more or less at his direction or suggestion.

Q. And you physically handed it to the newspaper men when it was completed? A. No, not in the sense you mean by physically. I sent my stenographer down to room 9, City Hall with the copies and he distributed them, with one or two other points, and I think one or two men called at the office for them. 1316

Q. Where was Government's Exhibit 29 for Identification distributed? A. That was handed out in two or three ways. That was handed the newspaper men who were present there at the office of the Commission that morning, and also copies were sent to room 9 of the City Hall. I distribute very largely all my matter from room 9 of the City Hall, which is the Reporters' Room. 1317

Mr. Matthews: I offer the exhibits for identification in evidence.

Mr. Mooney: Will you offer them separately?

Mr. Matthews: I offer in evidence Government's Exhibit 29 for Identification.

Mr. Mooney: I can not see its relevancy, but there is no use of making mountains of objections.

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The Court: I suppose there is a point to it.

Mr. Matthews: The only object is to make complete the record and to make clear the testimony of some of the other witnesses with respect to statements handed out by the Public Service Commission with respect to the conference. I want to make the record clear, but the statement did not include the letter of Mr. Craig and the letter from Mr. Craig was not given out by Mr. Nixon

1319

or any one connected with the Public Service Commission.

The Court: I will receive it for that purpose, and that purpose only.

Paper received in evidence and marked "Government's Exhibit 29."

Mr. Matthews: I now offer in evidence Government's Exhibit 30 for Identification. I understand it is received for the same purpose?

Mr. Mooney: We make the same objection, and the further objection that this is

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after the act or fact that is charged in the information.

The Court: Do you press that objection? I don't see that it makes any difference whether this paper is in or out.

Mr. Matthews: I think it illustrates the examination of Mr. Nixon, that he did not have a copy ofthe document when he testified he left the physical giving out of the copies after he directed their preparation to his subordinates, his secretary and others of the Commission, that Mr. Robbinson had

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charge of sending these out, and did send them out.

Mr. Mooney: I feel that I must stand upon my objection, because counsel's statement is that it is proving a negation, and in view of his statement I feel I must press my objection.

The Court: Do you object to both papers?

Mr. Mooney: I object to the one as irrelevant. I object to this on the ground that it is not in suppose of any act or fact stated in the information.

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The Court: Objection sustained as to the second paper. I will allow the first paper in merely on the point of time. That is the only thing, and perhaps also, as to the first paper, in the way of corroborating the testimony of Mr. Nixon as to not having given out this letter. Now, I don't know that it makes a particle of difference if I receive the first paper. I will receive the first paper with these strict limitations.

Mr. Matthews: I think that is all.

Mr. Mooney: To preserve our position we except to your Honor's ruling and to your qualification as well separately and to each.

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Cross Examination by Mr. Mooney:

Q. Mr. Robbinson, you have been connected with the Public Service Commission for a number of years, have you not? A. About four years, I believe four years.

Q. And Mr. Nixon was asked about the arrangement with the stenographer which antedated his coming, so I will ask you a few questions to sup-

1324 plement his testimony in that respect. There is an arrangement between the Commission and the stenographer for the transcribing either on the typewriter or in print, when large quantities are needed, of the proceedings of the sessions, is there not, and there was such an arrangement in effect in October, 1919?

Mr. Matthews: I object to the questions as containing too many different questions.

The Court: Ask what the arrangement

1325 was.

Q. What was the arrangement between the Commission and the stenographer in regard to getting out copies of the proceedings? A. I don't recall the exact terms of the contract, but my recollection is that the contract provides that the reporter has the privilege of selling copies of testimony before the Commission.

Q. And that inures to the benefit of the Commission as to all copies sold? A. It inures to the benefit of the Stenographic Fund of the Commission, not the Commission.

1326 Q. We think perhaps that is the same thing. The substance of the arrangement is, that the more copies sold the better it is for the Commission or its Stenographic Fund? A. It is better for our Stenographic Fund, yes, sir.

Q. And there is no limitation upon that, is there, that is they do not have to get your permission or Mr. Nixon's permission to give out their copies, that goes as a matter of course? A. Not for ordinary hearings. I don't know whether—I think that this stood in a little bit different position. That was not a regular hearing before the Commis-

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sion. It was a conference, and my recollection is that the stenographer called on some one—that is only recollection—and asked, owing to the semi-private nature of the conference whether he should have the privilege of selling copies of that, but what the reply was I don't know.

Q. It is a fact that there was a great demand for the copies of this proceeding? A. Without seeing the stenographer's books, I can not reply to that, Mr. Mooney. I assume they had some demand.

Q. You have spoken of a semi-private nature of the proceedings. We understand that what you 1328
would mean by that is that this was not a statutory public hearing under the laws of the State of New York. That is what you have in mind? A. It was that, and it also took into consideration the exclusion of the reporters from the room following or about following the conclusion of the statement read by Mr. Nixon, which is this Government's Exhibit 29, I think.

Q. In other words, that, which had started as a public discussion—leaving out of consideration the word "hearing," but that which had started as a public discussion, and which you felt to be such 1329
and had commenced to have reported in the press, about 11:40 or 11:45, turned thereafter into a closed conference by reason of the suggestion of some person. Is that it? A. I should not say that. I don't so understand.

Q. You had no objection in getting ahead of anybody by having Commissioner Nixon's material made public and then closing the conference? A. No. My intention was that the whole matter was to have been closed and gone into executive session.

Q. Your intention or wish must have taken

1330 wings before 11:40 or 11:45, when you gave this out to the press?

The Court: 11:30 or 11:45, he said.

A. Yes, that is right. I don't know what you mean by my wish having taken wings.

Q. Put it this way: We have all been living in this town quite a while, we know the elements of publicity. You did not want to put something over in favor of the Commissioner by having his
1331 speech given out to the press, as you did at 11:30 or 11:45, and then say a little later that the rest of you are closed off. You did not intend to use the appropriate vernacular that the Commissioner was to get a beat on the others in getting his remarks into the public press, did you? A. I should not say that, no.

Q. In other words you intended to do what was nice and fair and right, didn't you? A. You are getting me a little bit away from the exact conditions. That was not the intention. The Commissioner's statement was prepared and I was asked
1332 to have it gotten ready for distribution. It was given to me a very short time before the conference began, and I went down to my own office, had it transcribed, put on the mimeograph which took me about an hour, I think, I brought it upstairs and by that time the conference had been closed. I merely went from the conference hall out to the reporters' room and gave them the statement, copies of it.

Q. The only reason I am putting this question to you, and the only thing that has given rise to it, is an observation of your own which, if left unexplained on the record, might have an erroneous

1333

impression. You have suggested that this was possibly not a public discussion, and I am wondering why Commissioner Nixon should want to get the public ear, and that you, as a loyal aid, should want to get the public ear, the rest of the folks were going to get cut off. A. I do not know if I am sure—

Q. From the length of time that has elapsed your recollection can not yet have become dim. Isn't it very plain that when you had it mimeographed—I suppose that is mimeographed—that when the mimeograph started to strike off Exhibit 29, and 1334
when you had it in your mind to send it to the regular press room at No. 9 City Hall, you knew that this paper thus struck off on the mimeograph was the statement of the Commissioner, which he intended to read at this meeting, and you intended to have published in the public press, you must have had at that time regarded as a public hearing. Now, at that time you certainly must have regarded that as a public hearing, unless you intended to get an unfair advantage of somebody else? A. You mean at the time I handed it out?

Q. When you started to have it mimeographed 1335
you knew that you intended to hand it out? A. No, I don't think I did. I don't think it was decided then as to whether it was to be left wide open or whether it was to be closed.

Q. Well, when was it decided that it was fair on the Commission's part to give out this paper? A. You will have to ask him that.

Q. But you are the man who had what is called the release. You were the man who released it for publication, were you not? A. Yes.

Q. If it was to be released you were the man to release it? A. That is true.

1336 Q. Then that release must have come by prior understanding or instruction from someone else or mental operation or act of your own. Now, don't all these things, taken as a combination of circumstances, show definitely to your mind, and refresh your recollection of the fact that it was intended to give everything at the conference to the press unless it should be decided otherwise, and you were prepared, you had all your armor prepared and you were ready for the fray? A. With the qualification, unless it was decided otherwise, I should
1337 say "yes" with this qualification. That where there are a large number of reporters present at any conference or any hearing before the Commissioner, we do not generally give out anything about that particular hearing, but this was a special thing, a statement read by the Commissioner. It was rather more lengthy than the reporters could conveniently get and the thing was prepared in advance for convenience, I should say.

Q. It was a subject of very great public interest at the time, wasn't it? A. Yes, I think it was. I think it still is, Mr. Mooney.

1338 By the Court:

Q. Let me ask a question I am not clear about. Is this Exhibit 29 recorded in the other book?

Mr. Mooney: Yes.

Mr. Matthews: It is referred to on several pages of Exhibit B.

The Court: The reason I ask it, is that I would like to have the record note, when I was ruling on Exhibit 29 I had the impression it was some paper different from the

one contained in Exhibit B, and that is the reason I made the statements I did on receiving it in evidence in a qualified way. At the moment I did not read Exhibit 29. Now this having been made clear to me, I will receive Exhibit 29 without limitations. Of course to that you have an exception. 1339

Mr. Mooney: I do not like to take exceptions merely as a matter of form. You are still, I think, under a misapprehension as to the length and breadth and scope of this paper. The paper is really the Comissioner's prepared remarks, which he started to read, and thus became a part of Exhibit B. But, of course, you will realize that the reading of the paper which is now Exhibit 29 as a part— 1340

The Court: Exhibit 29—

Mr. Mooney: Of the actual proceedings within the four walls of the room is entirely a different situation from the giving out of a part of the proceedings to the public press. If you have that in your mind, there is nothing more to be said.

The Court: I understand that. 1341

Mr. Mooney: The Commissioner was well armed and prepared for his part of the publicity campaign, as a man should be on a great public question.

The Court: The stenographer may note that I have received Exhibit 29 without limitation or qualification.

Q. Now did the newspaper men come around there looking for copies of the Comptroller's letter

1342 as part of the stuff that they wanted to publish? A. I believe so, in fact I know so.

Q. And did you hear the expression used generally by the men crowded around your place there that they had heard that there was a hot letter from the Comptroller, and that they wanted to get a copy to put in the paper—so as to have it exact—now, is not that the substance of what they said to you? A. Yes, sir.

Q. Has it been your experience in the Public Service Commission, during the four years you
1343 have been there, that a matter which is of public interest and discussed by a number of persons invariably gets into the press sooner or later. Is that your experience, if it is a matter of public interest? A. I could not make it so broad as "invariably," generally, possibly, generally possibly.

Q. You gave no distinct or express authority for the publication of the letter, if that is what my learned friends would call it, in this printed volume, Exhibit B? A. I don't know to what you refer.

Q. I will ask you in simpler language: Did you
1344 tell the stenographer that he could or should print the Comptroller's letter of October 6th in this printed volume, Exhibit B? A. I had no conversation with him on the subject whatever.

Q. In other words, so far as you know, he did that acting upon his contract and his contractual relation to the Commission? A. I presume, because it was a part of the proceedings.

Mr. Mooney: That is all.

1345

Re-direct Examination by Mr. Matthews:

Q. You did not give the Comptroller's letter out to the newspapers that day? A. I certainly did not.

Q. Was it given out to your knowledge by any one at the Public Service Commission? A. It was not.

Q. When was this pamphlet, Defendant's Exhibit B, prepared, if you know? A. I cannot tell you definitely. I can tell you what I think, if that is permissible.

Q. What? A. I should say it would take about 1346
two days to have that printed, possibly two days and a half to have that printed and ready for distribution, it might be less than that, possibly a day or a day and a half, but I don't think you could get it ready so quickly.

Q. Is it fair, then, to assume that it was not delivered on October 6th? A. Oh, absolutely. It could not be done. I think it would be a physical impossibility.

Q. Mr. Mooney asked you some questions with respect to the contract for stenographic reports. Isn't it true that proceedings of this kind are a little 1347
out of the ordinary and are not sold as a matter of practice by the stenographer until he secures the release of some one in authority in the Commission? A. Generally I would say that he would confer with Mr. Walker on that subject, or in Mr. Walker's absence with himself.

By Mr. Mooney:

Q. We had some evidence here that the letter when it came in from the Comptroller was in a wet condition from its being copied, that it was not yet

1348 dry. Do you remember that circumstance? A. No, sir. I didn't know that the letter had arrived until, I think, the conference had started. I think the conference had started before I knew that. It is pretty far back, a little too long—

Q. Would you have to do with the making of a copy of the letter or sending the original letter of the Commissioner here to Judge Mayer? A. No.

Q. Do you know who did have? A. I assume Mr. Walker directed it. I am a little bit doubtful although my recollection is Mr. Walker was away
1349 that day, and that some one came to me and said that Judge Mayer, or some one in his office, desired a copy of that letter. Later—I am not absolutely certain about that—I am a little bit hazy about that.

Q. Do you remember Colonel Stimson taking a copy of the letter with him? A. No, sir. I didn't know anything of the sort.

Q. You don't know all the details about the letter, how it was copied or gotten out of the office? A. I don't remember any details as to how it was copied, was received, or anything of the sort.

1350 Q. My last question is as to how it left? A. No, I do not remember.

Mr. Mooney: I want, if I can, to save calling another witness, a separate witness—

Q. The contract to which we have been referring with the stenographer, is that the contract made with J. McNamara, doing business under the name of the General Shorthand Reporting Company? A. Yes.

Q. And is Mr. McNamara still the reported for the Commission? A. He is.

1351

Q. Under the contract? A .Under the contract.

Mr. Matthews: Just one moment, or two.

By Mr. Matthews:

Q. Mr. Mooney asked you about the details of letters going out of the office, and you said that you did not know anything about the details of copy going out of the office. Did you have anything to do with the release, the giving out of the copies to anyone? A. Except as I would have such relation as Assistant Secretary of the Commission to any document going out of the office of the Commission. It might go out in two ways.

1352

Q. Did you talk with anyone about giving out a copy of the letter over the telephone or otherwise? A. Yes, sir.

Q. With whom did you talk? A. I talked with someone in room 9 of the City Hall. The person I cannot now identify.

Q. Diid you call up that room on the suggestion of the Commissioner? A. No, sir; on the suggestion of one of the reporters.

1353

Q. Did you then report to the other officials of the Commission, either the Commissioner himself or some one else, the substance of the conversation you had over the telephone, at that time? A. Eventually I may have done so. I think I told the reporters.

By Mr. Mooney:

Q. He wants to know if you made any report? A. No, I made no formal report, I may have made mention of the matter later.

1354

By Mr. Matthews:

Q. How long after would it have been that you mentioned it to the Commissioner, or some other officials, some other person who attended the conference aside from the reporters? A. That is difficult to fix. I don't know, may have been fifteen minutes or may have been an hour, Mr. Matthews, I am not certain.

Q. How long after the adjournment of this conference was this telephone conversation? A. With

1355 room 9?

Q. Yes? A. It was while the conference was in progress. It was after the reporters had been eliminated from the conference, while they were standing out in the hall waiting for the conference to adjourn. Is that an assumption?

Q. That was the assumption of my question. Your recollection then, is that it was before the conference had adjourned? A. I am positive of it.

Q. Now, for the purpose of fixing your mind on the time, Defendant's Exhibit B, page 44, says: "Whereupon at 12 o'clock noon on the 6th day of

1356 October, 1919, the hearing in the above entitled matter was adjourned." Does that assist your memory as to approximately the time of adjournment? A. I assume that is correct. That is all I know. I don't know exactly the time the conference broke up.

Q. Well, it is customary for the stenographer to indicate accurately the time of adjournment? A. It was put on the adjournment sheet and brought to the legal department as well as put in the minutes by the stenographer.

Q. Can you state approximately how long before the adjournment it was that this telephone conver-

1357

sation took place? A. No, it must have been between 11:30 and 12. The adjournment you say, was, 12 o'clock?

Q. Yes? A. It was between 11:30 and 12 o'clock, because I came upstairs with these—

By Mr. Mooney:

Q. Excuse me. Upon what do you base the assumption that it was 12 o'clock? (Mr. Mathews indicates on paper to Mr. Mooney.)

By Mr. Matthews: 1358

Q. You say you came up with the copies of Government's Exhibit 29 at 11:30? A. About 11:30.

Q. And it was between that time? A. It was after that, I think, I was told of the arrival of the letter and I went to the telephone and called up at the request of some reporter.

Q. Will state to us your corversation with room 9 of the City Hall, or the substance of it?

Objected to. 1359
Objection sustained.
Exception.

By Mr. Mooney:

Q. Mr. Robbinson, I note in this printed book, which I confess is a surprise to me, it says "Whereupon at 12 o'clock M. on the 6th day of October, 1919, the hearing in the above entitled matter was adjourned." Now, this paper starts, it says, "at 10:30 o'clock." There are only forty-four printed pages in this book. That combination of hours and

1360 pages leads me to ask you with reference to the testimony that has been given here by some of the witnesses, viz.: that after the breaking up, so to speak, there was an additional or separate conference which was prolonged for some time. It seems quite evident that it did not take from 10:30 to 12 o'clock to do the business that is stenographically reported in forty-four pages. I am asking you to tax your memory, but if you are the man who would know about that I would like to get it from you, because this question of 12 o'clock may have an
1361 important bearing? A. I don't think I knew that there was a second conference. I did not know of one. I don't recall it.

Q. Don't you remember that some people remained afterwards—Commissioner Delaney and some of the others, and that they had a talk? A. They may have, I don't recall it.

Q. You realize, I hope, that while you are on the stand you are controlled by no printed matter or material or anything else, and that you are to give your best recollection, and it does not make any difference what other people's records may be or
1362 whether it is noted in a certain department or not, you know in regard to what took place at the conference by the fact that the Commissioner had to read and did read the remarks which you handed out, and the Comptroller's letter was read and then that these remarks were made as contained in those forty-four pages, which comprise the whole of Exhibit B. Now, with these things in your mind, will you give us your best recollection, if you have a recollection, as to whether that conference took as much time as an hour and a half? A. I cannot tell you, Mr. Mooney. I wasn't there. I was downstairs when the thing started, so I don't know.

1363

By Mr. Mathews:

Q. Where were you when the conference started? A. I was downstairs getting this thing out when the conference started.

By Mr. Mooney:

Q. Will you tell us outside of the records, because the records are not infallible; will you tell us who was present on that occasion. Who would know beside the stenographer; have you some clerk or attendant or other person connected with these 1364
public hearings, who would have a real knowledge of the time when it commenced and the time when it ended? A. No, sir. I assume that an adjournmentship is also filed by the stenographer with a member of the legal department attached to the secretary's office, that is the custom, but I don't know; that would be the most accurate—

By Mr. Matthews:

Q. In connection with this question of the length of time required, I notice on pages four, five and 1365
six, there was apparently a list of appearances. Your experience is that in taking a list of appearances the stenographer in getting accurately the names of the persons represented consumes quite a little time? A. Yes, although I think in all fairness that is some times done in part at least, before the conference begins. He goes about the room and attempts to get as many as he can before the conference begins.

Q. You don't know when it began? A. No, I was not on the floor.

1366

Q. I notice at page four the statement "The Conference began at 11:40"? A. I don't know?

The Court: He does not know. Everything on that score is apparently argument.

WILLIAM A. ANDERSON, a witness called on behalf of the United States, being duly sworn, testifies as follows:

1367

Direct Examination by Mr. Matthews:

Q. On September 6th, 7th, 8th and 9th you were the secretary of Job. E. Hedges, Receiver of the New York Railways? A. Yes.

Q. Did you receive some instructions from Mr. Hedges concerning the sending out of some papers, the same being Government's Exhibit 26? A. I did.

Q. I wish you to state in detail just what you did in compliance with those instructions? A. Saturday morning, September 6th, Mr. Hedges gave me

1368

some papers that he desired to have put in printed form and directed me to distribute them to each member of the Board of Estimate and Apportionment and to the Public Service Commission and the Mayor and many other civic organizations throughout the City and the State.

Q. Now state what you did? A. I got a printer and started in—

Mr. Mooney: I object to that as incompetent with respect to the defendant.

The Court: Objection overruled.

1369

Mr. Mooney: I except.

The Witness: I got in touch with the printer and gave him a draft of the stuff, and had him put it in galley form. On Saturday night, September 6th, he came to my house. I compared the proof and told him to get a lot out by Monday morning, which he did. On Monday morning I started the distribution. There were three-faced typewritten letters signed by the three receivers, Mr. Garrison, Mr. Hedges and Mr. Sheffield, as Trustee, and those I had my office boy 1370
deliver personally to the Mayor, Mr. Delaney and Mr. Nixon. Later in the day the printer began to deliver the letters and memorandum and I had my stenographer, Mr. Timmerman, prepare the envelopes for certain special people, such as the Mayor and the Commissioners and the Board of Estimate and Apportionment. I wanted to get those out first.

Q. Is Mr. Timberman, the Mr. E. L. Timberman who took the stand before in this proceeding? A. Yes. I had the law department and other people 1371
prepare me lists from which the envelopes could be addressed. I had various other departments help in addressing the envelopes. But, the Board of Estimate being an important one, and as Mr. Hedges told me specially to see that they got the memorandum early, I had gone in my own office. Mr. Timberman addressed those envelopes and handed them back to me. I looked to see that they were properly addressed and then handed the envelopes to Richard Hammand, my office boy, to enclose in the envelopes the pamphlets to be sent out.

1372 Q. When you say, "enclose in the envelopes the pamphlets to be sent out," you are referring to copies of Government's Exhibit 26 for Identification? A. Yes, and as we were all together in one office, I saw the boy enclose the copies in the envelopes which had previously been prepared by Mr. Timberman, and when the pamphlets were enclosed he sealed them and stamped then. In fact, he brought them back to me, and I took those envelopes with the pamphlets so enclosed and put them in Mr. Hedges personal office awaiting the time when I
1373 would send them with others to the post office later during the day.

Q. Do you know what later was done with them? A. I had some porters come in with large sacks—I don't think that on the first day there were so many—they had only one sack, and with an office boy from another department I sent the porters over to the Hudson Terminal Post Office, and they deposited them in the post office and brought the sacks back empty.

Q. Have you a list there of the Board of Estimate and Apportionment which you say you had
1374 Mr. Timmerman address these envelopes to? A. I have.

Q. I think that has previously been marked Government's Exihibit 5 for Identification? A. Yes.

Q. Did Mr. Timmerman hand this list back to you with the envelopes he had addressed? A. He did.

Mr. Matthews: I offer it in evidence.

Received and marked Government's Exhibit 5.

1375

Q. Did you send additional copies to the Board of Estimate and Apportionment? A. I did.

Q. When? A. As far as I recall, without looking at my papers, I think it is a week later.

Mr. Mooney: I object to further questions of this kind. I do not understand what the words "additional copies to the Board of Estimate and Apportionment" may mean in that connection, in that the expression is a series of conclusions.

Mr. Mathews: I am referring to additional copies of Government's Exhibit 26 for Identification. 1376

The Witness: Yes, I did send some.

Q. I mean in addition to those which the witness has testified were enclosed addressed to the persons named in Government's Exhibit 5 for Identification.

The Court: Exhibit 5 received in evidence now.

Mr. Mooney: I object to that.

The Court: Go ahead, Mr. Mooney.

Mr. Mooney: I understand better now. The objection is not raised at this point. 1377

The Witness: I did deliver additional copies of Exhibit 26.

Q. If necessary to refresh your recollection as to the date, refer to any papers which you have, and give me the date they were sent over? A. On September 15th.

Q. Were they accompanied by a letter? A. They were.

Q. Have you a carbon of the letter? A. I have

1378

Mr. Mathews: I ask that that letter be marked for identification.

Letter marked Government's Exhibit 31 for Identification.

Mr. Mathews: I offer it in evidence.

Mr. Mooney: The objection is that the paper is not sufficiently proven, and that it is incompetent.

By the Court:

1379 Q. As I understand you prepared that letter, of which Government's Exhibit 31 for Identification is a copy? A. Yes, sir.

Q. To whom did you deliver the letter? A. My office boy delivered the letter.

Q. To whom did you deliver it, did you personally deliver it to the person to whom that letter is addressed? A. No, sir.

The Court: I cannot take that.

By Mr. Mathews:

1380 Q. Did you deliver it to the office boy at the time you delivered the letter, the 20 copies of Government's Exhibit 26 for identification? A. I did.

Q. What was the name of the office boy? A. Richard Hammond.

Q. Do you know the name of the porter or porters to whom you delivered the mail bags containing the envelopes addressed in accordance with Government's Exhibit 5? A. Yes, I have the names in my file.

Q. Give me the names. I believe you said there was another office boy, give me his name? A.

1381

Roger Waters was the other office boy, and the porters were Frank Donahue and John Mazurski.

Q. And was this mail sent over or gotten out in the regular course of business in the office of the Receiver? A. It was a little unusual on account of its volume, but it was handled in the usual way.

Mr. Mathews: That is all.

Mr. Mooney: At this point I move to strike out the testimony of the witness with respect to the transmission of Government's Exhibit 26, on the ground that the answers disclose that the witness did not have personal knowledge of the transactions to which he testiefid regarding the mailing thereof.

1382

The Court: Let me get it clear in my mind.

By the Court:

Q. As I understand you, you saw the envelopes addressed to the various members of the Board of Estimate and Apportionment, the names appear on Government's Exhibit 5? A. I do. I examined them very carefully.

1383

Q. You saw and examined the envelopes? A. I did.

Q. And you saw that they were addressed to these eight members of the Board of Estimate and Apportionment whose names are set forth in Government's Exhibit 5? A. Yes, sir.

Q. Now, did you stamp the envelopes or was that done by somebody else? A. That was done by Richard Hammond in my presence.

Q. So that the procedure had, so far as you were concerned, to your personal knowledge, gone up to

1384 that point where there were stamped envelopes containing Exhibit 26, each of said envelopes respectively addressed to the respective members of the Board of Estimate and Apportionment whose names are set forth in Government's Exhibit 5? A. Yes.

Q. Now, after that what did you physically do? A. I took this particular batch of envelopes which you have just dsecribed and put them in Mr. Hedges personal office, which adjoins mine, and left them there until later in the day, when I saw this
1385 particular batch of envelopes put in the sack which the porters took to the post office.

Mr. Mooney: I move to strike out "which the porters took to the post office."

The Court: Which the porters carried away.

Mr. Mooney: I move to strike out "post office" here, and you strike out everything after that that he has testified to on that subject. This leaves in only that much with respect to the mailing and stops at the
1386 point where he handed it, or that the porters took the sack?

The Court . Containing the envelopes.

Mr. Mathews: Up to the time that they left his presence?

Mr. Mooney: Yes.

By Mr. Mathews:

Q. What kind of a sack was this that they went in? A. A large burlap sack.

Mr. Mathews: That is all.

Mr. Mooney: No questions.

1387

RICHARD HAMMOND, a witness called in behalf of the United States, being duly sworn, testifies as follows:

Direct Examination by Mr. Mathews:

Q. Richard were you an office boy in Mr. Anderson's office last September? A. Yes, sir.

Q. Do you recall filling and sealing some envelopes, Richard? A. Yes, sir.

Q. Of course you have not had much experience testifying as a witness, have you? A. No, sir, I have not.

1388

Q. I wish you would tell me just what you did with those envelopes? A. I put some circulars in—

Q. Tell me first where you got the envelopes? A. Mr. Anderson asked me to enclose some circulars in them, to stamp them and seal them and hand them back to him, which I did.

Q. You did that? A. Yes.

Q. I show you Government's Exhibit 26 for Identification, is that the circular which you used in filling these envelopes? A. Yes, sir.

Q. A circular just like that? A. Yes, sir.

1389

Q. Do you recall that particular batch of envelopes? A. Yes, sir, I do.

Q. Do you recall any persons to whom they were addressed? A. To the Board of Estimate and Apportionment.

Q. Did you seal them and stamp them separately? A. Yes, sir, I did.

Q. About how many were there in that batch? A. About eight or ten.

Q. When you got through with them to whom

1390 did you give them, what did you do with them? A. Gave them to Mr. Anderson.

Q. Do you know what happened to them after that? A. Mr. Anderson put them in Mr. Hedges office.

Q. You saw him do that? A. Yes, sir, I did.

Q. Did you see them again after that, up to the time they were put in the mail sack? A. I did.

Q. Were you there when they were put in the mail sack? A. Yes, sir, I was there.

Q. Who else was there? A. Mr. Anderson was
1391 there too and Roger Waters, I believe.

Q. Roger Waters, who is he? A. He is an office boy in the engineering department.

Q. Any body else there? A. And the stenographer, I believe, Mr. Timmerman.

Q. What kind of a sack were they put in? A. A regular mailing sack, a large burlap sack.

Q. What happened to the sack? A. Two men brought it over to the post office.

Q. Did you go over to the post office with them? A. No, sir.

The Court: Strike out the words "Two
1392 men brought them over to the post office."

By the Court:

Q. Two men took them away? A. Yes, sir.

Q. Were they a couple of porters? A. Yes, sir.

By Mr. Mathews:

Q. Did Roger go over with them? A. Yes, sir.

By the Court:

Q. Did you deliver any letters to anybody? A. Yes, sir, I did.

1393

Q. To whom did you deliver letters? A. The Mayor, Comm'ssioner Nixon and Commissioner Delaney.

Q. Did you go to the City Hall? A. Yes, sir.

Q. Do you remember what date it was? A. It was September 8th.

By Mr. Mathews:

Q. The same day you are talking about here? A. Yes, sir.

Q. Do you recall going over to the Board of Estimate and Apportionment some time later for Mr. Anderson? A. The same day? 1394

Q. No, not the same day, about a week later? A. Yes, sir; I do.

Q. Where did you go? A. I went to the Municipal Building.

Q. What did you take with you that time? A. Twenty circulars accompanied by a letter.

Q. Did you see the letter before it was sealed. Do you know what was in it? A. No, sir; I didn't see the letter.

Q. To whom did you deliver it over there? A. To the Comptroller. 1395

Mr. Mooney: I move to strike that out.

The Court: Motion granted. Strike that out.

The Witness: I delivered it to some man there.

Q. I show you Government's Exhibit 31 for Identification, and ask you whether you have ever seen that before, or the original of which that is a carbon? A. No, sir, I did not.

1396

Q. You don't recall ever seeing that? A. No, sir.

By the Court:

Q. When you got these letters which you delivered to the man in the Municipal Building were these envelopes sealed? A. Well, I only got one letter, and then I got the circulars and had a small package.

1397

Mr. Matthews: I think the witness is speaking now about the second occasion.

The Court: That is what I mean.

Q. Was the letter in an envelope? A. Yes, sir.

Q. And was the envelope sealed? A. Yes, sir.

By Mr. Matthews:

Q. Who gave you the envelope? A. Mr. Anderson.

Q. And did he give you twenty copies of the Ex-
1398 hibit 26? A. Yes, sir.

Q. And they were in envelopes? A. No, sir; they were in a package.

Q. And that is all that you knew about what was in them? A. Yes, sir.

Q. Then you delivered twenty copies of Exhibit 26, and an envelope containing some kind of a letter to a man in the Municipal Building? A. Yes, sir; I did.

Q. And what office was the man in, do you know? A. I believe in the Comptroller's office.

By the Court:

1399

Q. Was it the Comptroller's office or the Board of Estimate and Apportionment?

By Mr. Matthews:

Q. What floor did you get off? A. I believe it was the sixteenth.

Q. Did you go to the room number indicated, if there was a room number indicated on the envelope? A. It was the outside office door. I didn't go—

1400

Q. You didn't go inside the office, you left it with somebody on the outside? A. Yes, sir.

Mr. Matthews: I think that is all now.

Mr. Mooney: I wish to examine him on the voir dire as to that.

Cross Examination by Mr. Mooney:

Q. When you went with these circulars and with this package of twenty copies you went to the Municipal Building, and you went into the elevator didn't you? A. Yes, sir; I did.

1401

Q. And then you asked to get off at some floor, didn't you? A. Yes, sir; I did.

Q. Now what floor was it that you got off at? A. The sixteenth.

Q. The sixteenth? A. Yes, sir.

Q. When you got off at that floor you went to some room where there was some number on the door, or some name on the door, didn't you? A. I went to a desk that was out in the hall.

1402 Q. Was there a policeman sitting there at the desk? A. Not when I went there, no; sir.

Q. Now it appears—or at least we know, or we think we know, that is the Corporation Counsel's office? Now was that where you went? A. No, sir; it was not.

Q. Now I am trying to find out what it was? A. It was the Board of Estimate and Apportionment.

Q. I think you are mistaken, and I would like you to run over there during lunch hour. You go
1403 over to the place you were and see what was there. Because the Board of Estimate and Apportionment is not on the sixteenth floor. Now you go there during the lunch hour, to the place you were, and you come back and tell the Judge where you really went, because I don't think you will find any place marked Board of Estimate and Apportionment over there, but you go over there and come back at four o'clock. You only went to the one floor that day? A. Yes, sir.

Q. And you went right to the place you were headed for to deliver the twenty books in the pack-
1404 age, right to that place? A. Yes, sir.

Q. You didn't have to be referred around from one place to another? A. No, sir.

By Mr. Matthews:

Q. Was the envelope you had, addressed to any one? A. Yes, sir.

Q. Did it have an address on the outside of the envelope? A. Just Board of Estimate and Apportionment.

Q. You don't recall anything further, then? A. No, sir.

1405

By the Court:

Q. Did it have a room on it? A. No, sir.

By Mr. Matthews:

Q. Did you show that to anybody else over there? A. I asked the elevator starter; the man who starts the elevators.

Q. He told you where to get off? A. Yes, sir.

Q. What floor did he tell you? A. The sixteenth floor.

1406

Q. Did you get off at the floor he told you, whether it was the sixteenth or not? A. Yes, sir.

The Court: The Court stands adjourned to 4 P. M.

---

4 P. M.

Present—The Court and same counsel as before.

RICHARD HAMMOND, resumes the stand.

1407

By Mr. Matthews:

Q. Mr. Mooney asked you this morning to go over and see if you could find the room, did you go over? A. Yes, sir.

Q. Did you find it? A. Yes, sir.

Q. What is the room number? A. 1346.

Q. What floor? A. The thirteenth floor.

Q. Did you see the place where you delivered it A. Yes, sir; I did.

1408

Q. Did you see any other marks or sign? A. No, sir, I didn't, he was out at lunch.

Mr. Matthews: That is all.

Q. There was a mark on the door of the place you delivered it? A. Yes, sir.
Yes, sir, Secretary of the Board of Estimate and
Q. Did you see the man you handed it to? A. Apportionment.

1409

Mr. Matthews: I now offer in evidence Government's Exhibit 31 for identification.

Received and marked "Government's Exhibit 31."

W. G. HENDERSON, a witness called by the United States, being duly sworn, testifies as follows:

Direct Examination by Mr. Matthews:

1410

Q. Mr. Henderson, are you connected with the City News Association? A. Yes, I am the Treasurer.

Q. Have you produced some records from the New York City News Association showing the matter handled on October 6th, 1919? A. Yes, sir.

Q. I wish you would show me particularly this material of matter turned in to the office by Jerome Daly on that day respecting a letter sent by Comptroller Craig to Mr. Lewis Nixon? A. Mr. Daly was assigned to the story and covered nearly all of it from the start. As to the letter it-

1411

self which you speak of, I can give you the time that it was received by Mr. Daly at the office and brought over. Is that what you want?

Q. What I want is the time the letter arrived in your office, if you have got that. The time Daly turned it in? A. The nearest I can come to that, Mr. Matthews, is the time that the copy was given to me, to the copy desk by Mr. Daly.

Q. Can you give that time? A. Yes, sir.

Q. All right, I wish you would? A. 12:59 P. M.

Q. On October 6th, 1919? A. Yes, sir.

Q. Are you now referring to a sheet with flimsy pasted on it? A. Yes, sir. 1412

Mr. Matthews: I ask that the sheet referred to by the witness be marked for identification.

So marked.

Q. I notice that there are two succeeding sheets with flimsy, part of the same document? A. They are.

Mr. Matthews: I then ask that all three sheets be marked as one Exhibit for identification. 1413

Marked Government's Exhibit 32, for identification.

Q. Did the City News Association subsequently receive information from any of its reporters concerning the contempt proceedings? A. I am in no position to state that, Mr. Matthews.

Q. Can you tell from an examination of the records? A. You mean on the same day, I suppose?

1414

Q. Yes, on the same day? A. The same day at 2:41 P. M. Corrigan, who was in the building, sent an article over which I have here to submit to you.

Q. Referring to the two sheets of paper which I ask to be marked Government's Exhibit 33 for identification, do you submit these? A. Yes.

Mr. Matthews: I ask that these be marked Government's Exhibit 33 for identification.

1415 So marked.

Q. Did he send these over by messenger or by telephone or how? A. Let me look at the copy.

(Copy handed witness.)

The Witness: That was telephoned over from this building by Mr. Corrigan to the office.

Q. Going back a moment to Government's Exhibit 32 for identification, can you state whether or not it is the original of Mr. Daly's report or

1416 story, or whatever you may call it, his take on that particular matter? A. This is original copy that Mr. Daly brought in and pasted it up and give it to the copy desk to be written up and read there, and they in turn passed it over to the operators to be sent to the newspapers.

Q. And this time 12:59 is the time it was turned over by Mr. Daly to the copy desk? A. Yes, sir.

Q. Did they read it first and time it afterwards? A. And timed it after it was read.

Q. Does the time 12:59 indicate that it had been turned over by Mr. Daly to the copying desk, and

1417

by 12:59 it had been read over by the copy reader? A. Yes.

Q. What happened to that particular take, speaking now of Government's Exhibit 32 for identification? A. It is first read by the copy reader, it is sent then to the telegraph operators and by them to the newspapers who are our members. It is a matter of five minutes after it is received by the company before it is sent out.

Q. And did that go out on that particular day? A. Yes, sir.

1418

Mr. Matthews: I offer in evidence Govment's Exhibit 32 for identification.

Mr. Mooney: I would like on the voir dire to ask whether the witness knows who is indicated by the initials upon the corner of the paper, on the right hand corner of the paper.

The Witness: That is Le Vien, the copy reader.

Q. Well, you have no personal knowledge of this yourself, you are speaking only from your general knowledge of transactions of your company, that correct, the regular operations? A. Under these circumstances that that copy was sent out on that day, this being from the records. 1419

Q. Now, was that put there at that time according to the regular custom? A. Yes.

Q. And this Mr. Le Vien, is he alive and well? A. I saw him ten minutes ago. I think he is.

Mr. Mooney: Then I think we will object. I would not take the objection if I thought it would be embarrassing to my learned

1420 friend. I think it is not competently proved. You may have it marked for identification, as I assume that is what you want with this witness.

The Court: Mr. Henderson says Mr. Le Vien will be over here shortly.

By Mr. Matthews:

Q. I notice on the back of these sheets a time stamp—I am referring now to Government's Exhibit 32 for identification—can you tell me what
1421 that indicates, how it got there and what it means? A. That time indicates the arrival of this particular sheet of copy in the operating room. It leaves the copy desk, goes to the operators in another room and when it comes there it is timed by an automatic time stamp, which you see here, when it is received there.

Q. That is just before it is transmitted over the ticker? A. Yes, sir.

Q. Government's Exhibit 33 for identification contains also a stamp upon the corner, 2:41 P. M. and initials? A. Yes, sir.

1422 Q. Does that also refer to Mr. Le Vien? A. Yes, that is Le Vien too.

Q. Would that indicate with the other marks on the paper that the reporter in this building telephoned that to Mr. Le Vien? A. Not to Mr. Le Vien. It was telephoned to the re-write man, and after it is re-written it is turned over to Mr. Le Vien as the copy-reader—Mr. Le Vien is not a re-writer.

Q. Who was the re-write man, if you can tell? A. If you will hand me the copy I can tell you.

1423

You better let Mr. Le Vien. I don't think those are his initials. I don't recollect that.

The Court: Anything more of Mr. Henderson?

Mr. Matthews: I will offer Government's Exhibit 33 for identification in evidence just to see on what ground Mr. Mooney will object.

By Mr. Mooney:

1424

Q. This paper contains the initials, likewise, of Mr. Le Vien, does it not? A. Yes, sir.

Q. Now the legend or words "Read by" and time, which is stamped by rubber or other impression on these sheets of paper, was that intended to be practically contemporaneous or synchronous with the stamp to which you referred which is made by a cutting in of letters on the back of the paper? A. No.

Q. When I say contemporaneous I do not intend to bring it down to seconds, but it is expected to take place in the regular course within a few minutes, is it not? A. Yes, sir.

1425

Q. And it is fair to say that the stamp which is cut into the paper is a safe means to use in checking up the time filled in in both of these instances by Mr. Le Vien, as you see on the face of the paper? A. Yes, sir.

Q. And that is so all the way through the work of your service, that one ought to check up within a couple of minutes with the other? A. The perforation or the automatic stamping should follow the written time as filled in by the copy-reader, a

1426 matter of two minutes perhaps, five minutes perhaps.

Q. Will you tell us in case of dispute or mistake which of these is taken as governing in the course of your business? A. The fact that one is mechanical, that is the stamp on the back is mechanical, I would say that that would control over the written time of the copy-reader.

Mr. Mooney: I have no questions. I object to this paper upon the same grounds
1427 as I did to the other, viz: that it should be proven by the person whose name is indicated on its face, namely, by Mr. Le Vien.

The Court: Decision reserved in the matter for the time being.

GEORGE ROBERTS, a witness called in behalf of the United States, being duly sworn, testified as follows:

1428 Direct Examination by Mr. Matthews:

Q. Were you associated in 1919 with Mr. Stimson, the party who represented the New York Railways in the equity proceedings? A. I was.

Q. Did you appear from time to time on arguments of motions and application before the United States District Court prior to October 6th, 1919? A. I did.

Q. During what period did you attend such hearings and proceedings? A. I have attended such hearings and proceedings almost weekly since the

1429

appointment of my firm as counsel for the Receivers to date.

Q. Have you seen and heard the Corporation Counsel either in person or through his assistants appear before the Court and argue motions and applications? A. I have. Both the Corporation Counsel, Mr. Burr, personally and Mr. Kohler, his assistant.

Mr. Mooney: I move to strike that out, your Honor.

1430

Q. Is that during the period of time first specified, the appointment of your firm down to and including October 6th? A. It is.

By the Court:

Q. 1919?

By Mr. Matthews:

Q. 1919? A. Yes.

By the Court:

1431

Q. Will you state before which judge of the United States District Court these proceedings to which you have referred were had and before whom they were heard? A. Honorable Julius M. Mayer, United States District Judge.

Mr. Matthews: You may examine him.
Mr. Mooney: I have no questions.

1432

ROGER WATERS, a witness called in behalf of the United States, being duly sworn, testifies as follows:

Direct Examination by Mr. Matthews:

Q. Roger, on September 8th, 1919, were you working for the Interborough Rapid Transit Company? A. Yes, sir, in the chief engineer's office.

Q. Did you see Mr. Anderson on that day? A. Yes, sir.

Q. Did he give you some instructions? A. Yes,

1433 sir.

Q. What did he do? A. He gave me instructions to bring two porters to the Post Office, with two sacks of mail.

Q. Where did they get the mail if you saw them get it? A. From Mr. Anderson's office.

Q. Did you see them put the mail in the bags? A. No, sir, I did not see them do that.

Q. Tell me now when you left about what time of day it was, who was present when you were in Mr. Anderson's office, if you can remember? A. Well, it was about five o'clock. Mr. Anderson's

1434 office boy and Mr. Timerman was present.

By the Court:

Q. You mean the office boy? A. His stenographer, Mr. Timerman.

Q. No, what was the name of the office boy? A. The young gentlemen who was just on the stand?

Q. No, Hammond? A. Yes, sir.

By Mr. Matthews:

Q. Were there two porters there? A. Yes, sir.

Q. In addition to these other people? A. Yes, sir.

1435

Q. What kind of sacks were they? A. Two large burlap sacks.

Q. Mail bags? A. Yes, sir.

Q. Now tell me where you went with these porters? A. To the Hudson Terminal Post Office, 30 Church Street.

Q. What happened after you got down there? A. We put the mail in the window there.

Q. You saw them do that? A. Yes, sir.

Q. Both the bags? A. Yes, sir.

1436

Mr. Matthews: That is all.

Mr. Mooney: No questions.

Mr. Matthews: I now offer in evidence Exhibit 26 for identification.

Mr. Mooney: I object to it first as incompetent and we further object to it upon the ground that it is not relevant to the matters stated in the alleged contemptuous communication, nor with reference to the charge contained in the information.

The Court: Objection overruled.

Mr. Mooney: I except.

1437

Received in evidence and marked Government's Exhibit 26.

CHRISTOPHER LE VIEN, a witness called in behalf of the United States, being duly sworn, testifies as follows:

Direct Examination by Mr. Matthews:

Q. Are you connected with the New York City News Association? A. Yes, sir.

1438

Q. In what capacity? A. Day City Editor, in charge of the Day Desk and Day Copy Desk.

Q. Was that your position October 6th, 1919? A. Yes, sir.

Q. I show you Government's Exhibit 32 for identification and I call your attention to the initials "read by Le V, time 12:59 P. M." and ask you if you can identify those initials? A. I can, yes, sir.

Q. Whose handwriting is that? A. Mine.

Q. When was it made? A. The date?

1439 Q. Yes. A. October 8th.

By the Court:

Q. Look at that again. It is very light?

(Witness takes paper over to the window and examines it).

A. October 8 it is stamped, I belive.

By Mr. Matthews:

1440 Q. At any rate it was in the early part of October, 1919? A. Yes, sir.

Q. And if this stamp says October 6th, it was October 6th? A. Yes, sir.

Q. And if it says October 8th, then it was October 8th? A. Yes, sir.

Q. What time did you make those initials? A. 12:59, the time it is stated on there.

Q. 12:59 P. M.? A. Yes, sir.

Q. Where did you get those sheets, where did they come from to your desk, if you recall? A. That I could not tell you. They were either

1441

brought in by a boy or handed to me by the general manager or assistant general manager. I don't recall which.

Q. Well did you put the 12:59 on there at exactly 12:59? A. At exactly 12:59.

Q. Does that indicate the time you received the sheet or the time you completed the reading of that particular sheet? A. That indicates the time I completed the reading of this particular sheet.

Q. Did you make some marks on that sheet in addition to your initials? A. Paragraph marks. Quotation marks.

1442

Q. After you completed reading that you put the time on it? A. After I completed reading it, I put the time on it.

Q. Now referring to Government's Exhibit 32 for identification, which is the paper you have in your hand? A. Yes, sir.

Q. I notice on the second page there is also a similar initial and time and on the third page, and the time is stated as 1:00 P. M. That indicates the time you completed the reading the third page of that exhibit? A. Yes, sir. Well it would not necessarily indicate that either. It may be that I

1443

read the letter through first and then it would be pasted in form to go out. Sometimes a piece of copy and a letter will come to the desk and I or my assistant will read the letter through and then we will cut it up and paste it and put it in proper form to go out to the machine.

Q. You don't recall this particular instance whether you pasted it up or not? A. No.

Mr. Matthews: I now offer Government's Exhibit 32 for identification in evidence.

1444

(Paper handed Mr. Mooney for examination.)

(Mr. Mooney examines same.)

Mr. Mooney: I would like to examine on voir dire as to this paper, your Honor.

The Court: Certainly.

By Mr. Mooney:

Mr. Mooney: Mr. Matthews, will you now give me Government's Exhibits 6 and
1445 7, please, relating to the same subject matter.

Mr. Matthews: I hand you now Government's Exhibit 6 and Government's Exhibit 7. Government's Exhibit 7 does not appear to relate to the same matter, but it is handed to you now. I mean it does not relate to these particular exhibits.

Q. Now Exhibit 33 for identification appears to have cut in it quite plainly, has it not, October 6th? A. It looks to me like October 6th.

1446 Q. Now Government's Exhibit 32 for identification, has that stamp, which appears three times in succession, that is on the first, second and third sheets, and in each of these instances the stamp seems to be quite clearly October 8th. Does it not? A. Apparently it is.

Mr. Mooney: Now I would like to follow along the relation of a number of exhibits here and if the Court has no objection I will stand here. (By the witness.)

Mr. Matthews: I have no objection to these questions as cross examination, but I

1447

understood Mr. Mooney was to examine on the voir dire of one particular exhibit, Government's Exhibit 32 for identification.

Mr. Mooney: That is exactly what I am attempting to do. That is my examination will be confined entirely to authenticity.

Q. Keeping down to the question of authenticity. What is the relative authenticity of the papers which are marked 6 and 7, which I now show you, to those that are marked Exhibits 32 and 33 for identification—what is the relative authenticity of 1448
these two sets of papers? A. The paper marked Exhibit 6 and the paper marked Exhibit 32 are practically the same. One is the machine copy and the other is the copy from which the machine copy was written.

Q. Well, why did you have the machine copy, which is No. 6 taken off from No. 32? A. It has to go out on the machine to be distributed.

Q. So that dealing with these now on the question of authenticity only, do these Exhibits 32 and 33 represent the incoming news and do Nos. 6 and 7 represent the outgoing news? A. The outgoing 1449
news, yes, sir.

Q. Then Nos. 32 and 33 did not come in over the wire? A. No, sir. Apparently not. 32 I know did not. 33 may have—did come in over the telephone wire.

Q. Yes, I thought that was an indication of that. Will you point out what indication there is that it was sent over the telephone wire? A. The man who sent it and the man who received it.

Q. And it was sent by whom and received by

1450 whom? A. Sent by Corrigan and received by Mr. O'Sullivan.

Q. And in the same way No. 32 to which I think you have already testified, was sent by Mr. Daly, wasn't it? A. The letter was sent in by Mr. Daly, yes, sir.

Q. Now still confining ourselves to authenticity. Where have the sheets 32 and 33 been up to the time that they were handed to the District Attorney? A. I could not tell you.

Q. Well, you would have about a million tons
1451 of stuff, more or less, if you kept all your original sheets? A. Well, we would have quite a lot, but we would not have quite as much as that. We have a pretty big storeroom full of it.

Q. Can you tell me—still on the question of authenticity, I am not searching for anything more but authenticity—can you tell me of any knowledge or information you have with respect to the passing of these papers from October 6th to Octo- 8th into hands of the District Attorney? A. No, sir, I could not.

Q. I am not calling for first hand information,
1452 I am calling now for any information you have. Do you know how the District Attorney got them? A. No, sir. I haven't the slightest idea.

Q. Mr. Corrigan is in court, isn't he? A. No.

Q. O'Sullivan, he is an inside man— A. No, he is a general worker.

Q. Was he covering the United States Courts at that time or on that day? A. He evidently was not. Corrigan's initials are on the paper.

Q. I am particularly interested in the opening paragraph of this paper—on the question of authenticity—I therefore want to ask you if Mr.

1453

Corrigan is not here if you will give me any information you can as to his office whereabouts? A. At the present moment?

Q. Yes. A. No, sir, I haven't the slightest idea.

Q. Was he the regular court house man of the service at that time? A. Yes, sir.

Q. And you don't know whether he is engaged in newspaper work now in New York City? A. Certainly. He is engaged with us. I thought you meant today, this particular minute.

Q. No, not this minute, but he is still with you? A. He certainly is.

1454

Q. And is therefore accessible? A. Yes, sir.

Mr. Mooney: I object to it upon the ground that it is not sufficiently proven and not connected with the defendant.

The Court: Objection overruled.

Mr. Mooney: I except.

Mr. Matthews: I don't think thre is any possibility of a mistake about the dates of these two papers. Do you question my reading of the date on the back of these sheets? I read October 6th.

1455

Mr. Mooney: You mean on both?

Mr. Matthews: Yes.

Mr. Mooney: I dislike to have you put it that way. Because I don't like to disagree about your reading of anything. But it did make a distinct impression on my mind that one was the Eighth and the other the Sixth.

Mr. Matthews: There is the Sixth.

The Court: I don't think we need spend any time on that.

1456

By the Court:

Q. Mr. Le Vien, referring to these exhibits, Government's Exhibit 32 and 33 for Identification, in the regular course of business these exhibits would be made up at the time the news came in, wouldn't they? A. Yes, sir.

Mr. Matthews: As a matter of fact this is the news as it comes in.

Mr. Mooney: Let it appear this way on

1457

the record and it will serve your purpose. I don't dispute the fact because it is a matter of impression, that would serve your purpose. In other words I don't want to foreclose the defendant if he has got somebody who has got better eyes than I have.

The Court: That is all you want with Mr. Le Vien?

Mr. Mooney: That is all.

Mr. Matthews: That is all for this witness.

Mr. Matthews: Now I ask to have marked

1458

in evidence, if it does not now constitute a part of the record and the Government's bill of particulars in this case—

Mr. Mooney: I am not quite familiar with that practice, but of course the bill of particulars is one of the papers in the case, but I do not understand that the offer imparts to it any greater verity that it is a paper in the case.

The Court: Quite so. The records will show that the request was granted under that condition.

Mr. Matthews: I now offer in evidence the bill of complaint and answer in the case of Westinghouse Electric Manufacturing Company, plaintiff against Brooklyn Rapid Transit Company, New York Municipal Railways Company and New York Consolidated Railway Company, defendants, in equity docket No. E 15347. 1459

Mr. Mooney: We object, that this is not competent evidence as against the defendant, and it might be saving time and be of use for me now to state very briefly what the position of the defendant is with respect to this matter. We realize of course that there must be evidence that a cause was pending in this court, in fact that there were three causes before the Court; we realize that there must be evidence with respect to these proceedings, so as to give a foundation for the allegations of the information and pertinency to the alleged contemptuous communication. But we object, nevertheless, to these papers and the contents thereof, separately and distinctly, on the ground that they are not evidence as against the defendant; in that they were neither served upon nor brought to his attention and that he is not connected with or chargeable with the contents thereof, nor bound by law nor in fact to have knowledge of their contents or to be charged with the consequences of a neglect to read or digest their contents. There is no obligation, that we are aware of, that requires a person to read such papers at his peril; and there is no element of negligence involved in the matter of contempt. It is not my intention to make an argument, but 1460 1461

1462 I think I have outlined my objection and I do so by stating specifically that these are incompetent against the defendant and are not connected with him and if we may, we would make a like objection and reserve an exception if they were admitted, or other papers are admitted. This is in the view and hope of economy of time. Of course that imports that they will be offered separately so that they can be separately considered. We can move more rapidly in view of my statement to the Court.

1463 The Court: The Court overrules the objection. The District Attorney will offer the papers separately so that they may be clearly identified; and the Court will rule now merely so that counsel for the defense may take an exception to each and every ruling.

Mr. Mooney: We now except to the admission of each and every paper to be offered under this ruling.

Mr. Matthews: The paper which has just been offered is endorsed, in addition to the title which I have already read "Bill of Complaint," and is dated December 31st, 1918,

1464 and contains the notation: Filed December 31st, 1918, at 6:40 P. M., J. M. M., D. J.

The Court: Where is that?

Mr. Matthews: I am using the printed record. It is understood that these records offered came to me as they are, the originals were physically here in court. I am using the printed record, page 24.

Received and marked "Government's Exhibit 34."

Mr. Matthews: I now offer the answer in the suit of the Westinghouse Electric Manu-

facturing Company, plaintiff, against the 1465
Brooklyn Rapid Transit Company, The New York Municipal Railways Company, New York Consolidated Railroad Company, in equity E 15347, dated December 31st, 1918, and endorsed, "Answer" filed December 31st, 1918, at page 6:40 P. M., J. M. M., D. J.

Received in evidence and marked "Government's Exhibit 35."

Mr. Matthews: I likewise offer the order appointing Receiver, that being the order appointing Lindley M. Garrison, as temporary receiver, in the proceedings, the title of 1466
which I have already read, and the docket number of which is the same.

Received in evidence and marked "Government's Exhibit 36."

Mr. Matthews: Government's Exhibit 36, that order being endorsed filed December 31st, 1918, at 3:40 P. M., J. M. M., D. J.

I also offer the Receiver's bond, entitled in the same proceeding, same docket number, dated December 31st, 1918.

Received and marked "Government's Exhibit 37."

Mr. Matthews: Next I offer the petition 1467
of Public Service Commission entitled and docketed as indicated consisting of notice dated January 12th, 1919, and petition signed by Godfrey Goldmark, Solicitor for the Petitioner, the Public Service Commission, First District, William M. Ransom, of Counsel for the petitioner and the petition itself entitled as indicated with the same docket number, the petition being dated January 12th, 1919, and sworn to by Travis H. Whitney.

1468 Received in evidence and marked "Government's Exhibit 38."

Mr. Matthews: It is understood that Exhibit 38 is the number to applyy both to the notice and to the petition itself.

The report of the temporary receiver submitted January 15th, 1919, I likewise offer. It is entitled in the same suit; same docket number. It is signed Lindley M. Garrison, temporary receiver, and is dated January 14th, 1919.

Received in evidence and marked "Gov-
1469 ernment's Exhibit 39."

Mr. Matthews: And the offer includes all the schedules annexed to the report.

I likewise offer exhibit to the Public Service Commission similarily entitled and numbered, signed by George D. Yeomans, and sworn to by T. S. Williams, January 15th, 1919, also sworn to by C. D. Meneeley, on January 15th, 1919.

Received and marked "Government's Exhibit 40."

Mr. Matthews: I likewise offer the affi-
1470 davit of the Corporation Counsel of the City of New York, entitled and numbered similarly, signed William P. Burr, January 15th, 1919, together with the exhibits annexed to the affidavit, being Exhibits A, B, C and D.

Received and marked "Government's Exhibit 41."

Mr. Matthews: I likewise offer the opinion of Mayer, J., making the receivership permanent and denying motion for a co-receiver.

Mr. Wolbarst: What is the date of that?

Mr. Matthews: It is not dated in this

record, but my understanding is that the opinion was delivered on January 15th. 1471

Received and marked "Government's Exhibit 42."

Mr. Matthews: I likewise offer notice and order continuing receivership during pendency of suit, entitled and docketed the same as bill, dated January 22nd, 1919. That offer includes both notices of that day, signed Walter F. Butler and order of that date, signed Julius M. Mayer, U. S. Judge.

Received and marked "Government's Exhibit 43."

Mr. Matthews: I likewise offer the petition of the receiver for authority to print record, similarly entitled and numbered, dated January 22nd, 1919, the offer including the notice of motion and petition, both bearing the same date, January 22nd, 1919. 1472

Received and marked "Government's Exhibit 44."

Mr. Matthews: I now offer order authorizing receiver to print record dated January 27th, 1919, signed J. M. Mayer, U. S. D. J., similarly entitled and numbered.

Received and marked "Government's Exhibit 45." 1473

Mr. Matthews: I likewise offer application of receiver for leave to employ certified public accountants, dated January 22nd, 1919, the offer includes notice of motion and the petition, both bearing the date of January 22nd, 1919.

Received and marked "Government's Exhibit 46."

Mr. Matthews: I now offer the petition of the receiver for an order fixing the time

1474 within which to affirm or disaffirm contracts, the offer being to include the notice of motion, dated January 22nd, 1919, and the petition itself, bearing the same date.

Received and marked "Government's Exhibit 47."

Mr. Matthews: I also offer application of Receiver for instructions and for leave to borrow money and issue Receiver's certificates, similarly docketed and entitled. The offer including notice of motion and the petition, both being dated January 22nd, 1919.

1475 I am wrong about the date. The notice is January 22nd, 1919, and the petition is dated January 21st, 1919, but is verified on January 22nd, 1919.

Received and marked "Government's Exhibit 48."

Mr. Matthews: I likewise offer application of Receiver which is file No. 22, application for instructions with respect to bank loans, similarly entitled and docketed, dated January 22nd, 1919, the offer including notice of motion and also petition, both bearing date of January 22nd, 1919.

1476 Received and marked "Government's Exhibit 49."

Mr. Matthews: I likewise have to offer with respect to bank loans—

Mr. Wolbarst: That is objected to as not having been indicated in the bill of particulars.

Mr. Matthews: The offer is withdrawn then, if it does not appear in the bill of particulars, for the present.

I offer the order respecting the submis- 1477
sion of the report of the receiver, file No. 23, entitled and numbered as indicated with respect to the bill, the offer including notice dated January 30th, 1919, and the order being dated February 1, 1919.

Received and marked "Government's Exhibit 50."

Mr. Matthews: File No. 24, I offer, being an order authorizing the receiver to employ certified public accountants entitled and numbered as indicated with respect to the bill. I offer both the notice of settlement 1478
dated January 30th, 1919, and the order itself, dated February 1, 1919.

Received and marked "Government's Exhibit 51."

Mr. Matthews: I now offer File No. 26, being order giving the receiver time within which to affirm the contracts. The order includes notice of settlement, dated January 30th, 1919, and the order itself, dated February 1, 1919.

Received and marked "Government's Exhibit 52."

Mr. Matthews: I likewise offer File No. 1479
27, order authorizing receiver to borrow money, that including both the notice of settlement, dated January 30th, 1919, and the order itself, dated February 1, 1919.

Received and marked "Government's Exhibit 53."

Mr. Matthews: I likewise offer File No. 28, that being the opinion of Mayer, J., in reference to appointing Special Master, dated February 3, 1919.

1480 Received and marked "Government's Exhibit 54."

Mr. Matthews: I offer File No. 38, petition No. 1 of Central Union Trust Company for leave to file a bill of complaint and affidavit, entitled as already indicated and with the addition of this title "In the Matter of the petition of Central Union Trust Company of New York, petition No. 1," the petition being verified on February 5th, 1919.

Received and marked "Government's Exhibit 55."

1481 Mr. Matthews: I now offer File No. 39, order granting petition No. 1 of Central Union Trust Company, for leave to file bill of complaint and affidavit, entitled in the suit already indicated with the additional title indicated with respect to petition No. 1, file No. 38, Exhibit 55.

Received and marked "Government's Exhibit 56."

Mr. Matthews: Government's Exhibit 56 includes a notice of entry of the order dated February 20th, 1919, and the order itself, dated February 20th, 1919.

1482 I now offer petition No. 2 of Central Union Trust Company for leave to file a bill of complaint verified February 5th, 1919, entitled in the suit already indicated, with the sub-title in the suit with respect to petition No. 1.

Received and marked "Government's Exhibit 57."

Mr. Matthews: I now offer File No. 41, being order granting petition No. 2 of Central Union Trust Company for leave to

file bill of complaint, being entitled as is entitled petition No. 2, the offer including the notice of entry dated February 20th, 1920, and the order itself, dated February 20th, 1919. 1483

Received and marked "Government's Exhibit 58."

Mr. Matthews: I now offer File No. 44, application of New York, Brooklyn and Manhattan Beach Railway Company for leave to sue the receiver.

Mr. Wolbarst: The same file, No. 42?

Mr. Matthews: That includes the notice of motion dated February 14th, 1919, and petition verified February 14th, 1919. I offer the whole of file No. 42. 1484

Received and marked "Government's Exhibit 59."

Mr. Matthews: I haven't finished my statement as to that. It includes a second notice of motion dated February 14th, 1919, and the notation in the petition verified February 14th, 1919, by C. L. Addison.

I now offer bill of complaint of Central Union Trust Company of New York against New York Municipal Railways Company, New York Consolidated Railroad Company, and Brooklyn Rapid Transit Company, this coming in file No. is found at page 529 of volume 1 of the Brooklyn Rapid Transit Receivership proceeding. The bill is entitled : Central Union Trust Company, plaintiff, against The New York Municipal Railways Corporation, New York Consolidated Railroad Company and Brooklyn Rapid Transit Company, defendants, bill of complaint in equity E15391, and verified by 1485

1486 E. Francis Hyde on February 5th, 1919, endorsed bill of complaint, U. S. District Court, filed March 1, 1919.

Received and marked "Government's Exhibit 60."

Mr. Matthews: The offer includes the bill and the exhibit down to and including page 894 of the printed record.

I now offer bill of complaint of Central Union Trust Company against Brooklyn Rapid Transit Company, being entitled the Central Union Trust Company of New York,
1487 plaintiff against Brooklyn Rapid Transit Company, defendant, and endorsed bill of complaint in equity E15392 and verified on February 5th, 1919, by E. Francis Hyde, endorsed U. S. District Court, filed March 1, 1919.

Received and marked "Government's Exhibit 61."

Mr. Matthews: That offer likewise includes the exhibits annexed to the bill of complaint and includes pages 895 to 1072, inclusive, of the printed record.

1488 It is now six o'clock and we have only finished offering one volume of Brooklyn Rapid Transit receivership proceedings and we have yet to finish the second volume and part of the third, and four volumes of the New York Railways not to mention the bankruptcy proceedings.

The Court: Let me suggest this: We will adjourn as stated this morning to the 8th of June at 10:30. Now, would it be practical between now and then to make up a list of the papers and let Mr. Mooney have that?

Mr. Matthews: I expect to follow closely my bill of particulars. 1489

The Court: We will now adjourn until the 8th day of June, 1919, at this room.

Adjourned to June 8th, 1920, at 10:30 A. M.

New York, June 8, 1920, 10:30 A. M.

Present—Judge JULIUS M. MAYER on the Bench.

Same counsel as before. 1490

Mr. Mooney: I presume the record will represent our meeting as heretofore, present the same counsel as before.

Mr. Matthews: In a preliminary way I would like to call attention to what appear to be obvious errors in the stenographic minutes at the last hearing. I refer first to page 447, first line at the top of that page "I show you Government's Exhibit 20 for identification" that should be "Government's Exhibit 26 for identification"; and I would like to have the reporter change it to 26.

Also on page 441 about the middle of the page there is "Answer, on December 5th.' That answer as actually made was "On September 15th." That is made clear by reference to the exhibit about which the witness was being questioned, Exhibit 26, which is dated September 15th. 1491

There is another matter that is not entirely clear, not covered, and I ask to have it made clear; Exhibits 32 and 33 for identification were offered and received in evidence, and while the contents of the record so show, there is nothing to indicate in the

1492 stenographer's minutes the point at which they were actually received in evidence. My recollection is that the clerk merely took the exhibits, crossed off the identification mark, leaving them marked Exhibits 32 and 33. I merely mention that so that the record may be clear.

Mr. Mooney: I assume the corrections should be made as indicated by Mr. Matthews. I have not had an opportunity to go over the minutes myself to observe whether further corrections should be made, but we will do that later.

Mr. Matthews: This is the first time I have
1493 called attention to the errors in the minutes, heretofore those that have been noted were of minor importance, but I think they have been corrected in pencil on both sides. If there should be any dispute about that we can check it up with the stenographer's minutes and there having been two stenographers present, we should not have any trouble in arriving at just what was said and done.

Before we proceed with the exhibits contained in the records referred to at the last hearing I offer in evidence the roll of attorneys of the Circuit Court of the United States, showing the admission
1494 to the Bar of this Court on April 21st, 1906, of Charles Lacey Craig, 22 William Street, address given at that time, April 12, 1906. If there is no objection I will merely read this entry, without having the record marked in evidence, and it can be known as Government Exhibit 62.

Considered as Government's Exhibit 62.

Mr. Mooney: So it will be known as Exhibit 62?

Mr. Matthews: Considered and known as Government's Exhibit 62.

Mr. Matthews: Roll of Attorneys U. S. Circuit Court, "Dated: April 21, 1906; Signature: Charles

Lacey Craig, 22 William Street; On whose motion: 1495
John A. Shields; By whom sworn: J. A. S. Paid," indicating that the fee for admission to the Bar was paid, and the initials J. A. S., being the designation of Mr. Shields, who at that time was Clerk of the Court.

I now offer File No. 51, Order granting motion of New York, Brooklyn and Manhattan Beach Railway for leave to sue the Receiver, which is found at page 1—a copy of which is found at page 1, volume 2, of the record, Proceedings of Brooklyn Rapid Transit Receivership, which Order is dated February 28th, 1919, and is signed John C. Knox, 1496
United States Judge.

Received in evidence and marked Government's Exhibit 63.

Mr. Matthews: I likewise offer File 52, page 3—and these pages until further indicated will refer to volume 2, just mentioned,—Order directing the Receiver not to pay any interest on the bank loans, dated March 10th, 1919, signed Julius M. Mayer, D. J.

Received in evidence and marked Government's Exhibit 64.

Mr. Matthews: I now offer File 53, a copy of 1497
which is found on page 5, application of Receiver to have matter of payment of interest on Brooklyn Rapid Transit Company first mortgage bonds referred to Special Master. This it dated March 7th, 1919.

Received in evidence as Government's Exhibit 65.

Mr. Matthews: I now offer File 64, copy of which is found on page 8, being the order referring the payment of interest on Broklyn Rapid Transit first

1498 mortgage bonds to Special Master, dated March 11th, 1919.

Received as Government's Exhibit 66.

Mr. Matthews: I now offer File No. 56, copy of which is found at page 21, being the report of Special Master in re issue of Receiver's Certificate, dated March 17th, 1919.

Received as Government Exhibit 67.

Mr. Matthews: I likewise offer File No. 57, copy of which is found at page 40, being Application of Receiver arising out of pledges of Brookln Rapid Transit bonds.

1499 Received as Government Exhibit 68.

Mr. Matthews: That offer includes a notice of motion dated March 17th, 1919, with the application itself of the same date.

I now offer File No. 62, copy of which is found at page 165, preliminary report of Special Master in re payment of interest on first mortgage bonds, that is dated March 26th, 1919.

Received as Government's Exhibit 69.

Mr. Matthews: I now offer File 68, copy of which is found at page 190, Petition of Receiver for instructions prior to the report of Special
1500 Master, in re advisibility of paying interest on mortgage bonds.

Received as Government's Exhibit 70.

Mr. Mattews: We offer to include Notice of Motion dated March 26th, and the Petition itself of the same date.

I now offer File 69, Order approving the preliminary report of the Special Master in re payment of interest upon mortgage bonds, copy of which is found at page 196, that is dated March 29th, 1919.

Received as Government's Exhibit 71.

Mr. Matthews: I likewise offer File No. 71, copy 1501
of which is found on page 201, being Order extending time for filing claims, dated March 29th, 1919.

Received as Government's Exhibit 72.

Mr. Matthews: I now offer File No. 76, being Petition of Receiver requesting employment of Carl M. Owen as solicitor and attorney for the Receiver.

Received as Government's Exhibit No. 73.

Mr. Matthews: Which is dated April 4th, 1919.

I now offer File 77, copy of which is found at page 224, Order of April 4th, 1919, authorizing employing of Cram M. Owen as solicitor and attorney for the Receiver.

Received as Government's Exhibit 74. 1502

Mr. Matthews: I now offer File 79, page 228, Opinion of Mayer, J., approving Report of Special Master in re award of War Department for dock property.

Received as Government's Exhibit 75.

Mr. Matthews: That is dated April 7th, 1919.

I now offer File 83, Application in re Crenshaw Construction Company contract, page 248, dated April 5th, 1919.

Received as Government's Exhibit 76.

Mr. Caffey: I now offer File No. 84, Order ap- 1503
proving action of Receiver as Receiver of New York Municipal Railway Corporation in taking over the work from Crenshaw Construction Company, page 257, dated April 8th, 1919.

Received as Government's Exhibit 77.

Mr. Caffey: I now offer Petition of Central Union Trust Company to consolidate causes and extending receivership, at page 272, dated April 11th, 1919, and apparently without file number.

Received as Government's Exhibit 78.

1504 Mr. Caffey: That includes the notice accompanying petition.

I next offer Order consolidating causes and extending receivership, page 278, dated April 21st, 1919, together with the notice accompanying, there is apparently no file number.

Received as Government's Exhibit 79.

Mr. Caffey: I now offer Order consolidating causes and extending receivership dated April 21st, 1919, together with notice accompanying it, at page 283, without file number.

Received as Government's Exhibit 80.

1505 Mr. Caffey: I now offer File No. 85, Order granting Equitable Trust Company leave to intervene against execution of order in the matter of the award of the War Department on dock property dated April 28th, 1919, together with notice accompanying it, page 297.

Marked as Government's Exhibit 81.

Mr. Caffey: I now offer File No. 86, Order extending time for presenting claims of the City of New York and the Public Service Commission for the First District, dated April 29th, 1919, at page 301.

1506 Received as Government's Exhibit No. 82.

Mr. Caffey: I now offer File No. 87, Order extending time for presenting claims to June 2nd, 1919, dated May 1st, 1919, at page 303.

Received as Government's Exhibit No. 83.

Mr. Matthews: I now offer File No. 88, copy found at page 305, Affidavit of Publication of Notice in re extension of time for presenting claims, dated March 31st, 1919.

Received in evidence as Government's Exhibit 84.

Mr. Matthews: I likewise offer File No. 89, copy

to be found at page 308, Order extending time of Brooklyn Rapid Transit Company to answer to June 19th, 1919, dated May 12th, 1919. 1507

Received as Government's Exhibit No. 85.

Mr. Matthews: I now offer File No. 90, copy at page 310, being Order dated May 12th, 1919, extending time of New York Municipal Railway Company, New York Consolidated Railroad Company and Brooklyn Rapid Transit Company to answer to June 19, 1919.

Received as Government's Exhibit No. 86.

Mr. Matthews: I now offer File No. 115, at page 389, being an application with respect to confirmation of contract No. 4, the offer including not only the application, but also the notice of motion dated May 9th, 1919. 1508

Received as Government's Exhibit 87.

Mr. Matthews: I now offer File No. 116, copy to be found at page 397, application for authority to issue receivers' certificates, the offer includes not only the application, but also the Notice of Motion, dated May 9th, 1919.

Received as Government's Exhibit No. 88.

Mr. Matthews: Likewise File No. 92, copy to be found on page 420, being application of receiver to have matter of payment of interest on Brooklyn Rapid Transit first refunding gold mortgage bonds referred to Special Master. The date of that is May 21st, 1919. 1509

Received as Government's Exhibit No. 89.

Mr. Matthews: I now offer File No.93, page 423, being Order referring matter of payment of interest on Brooklyn Rapid Transit first refunding gold mortgage bonds to Special Master.

Received as Government's Exhibit No. 90.

Mr. Matthews: I likewise offer File No. 94, on

1510 page 497, being Affidavit of Corporation Counsel upon the application for authority to issue receivers' certificates, that affidavit being dated May 22nd, 1919.

Received as Government's Exhibit No. 91.

Mr. Matthews: I likewise offer File No. 95, copy found at page 436, being exceptions of Central Union Trust Company of New York as trustee, etc., to the report of the Special Master, dated May 22nd, 1919.

Received as Government's Exhibit No. 92.

Mr. Matthews: I now offer File No. 96, copy at
1511 page 441, Decree providing for the issue of receivers' certificates, together with Notice of Entry. The decree is dated May 29th, 1919.

Received as Government's Exhibit No. 93.

Mr. Matthews: I now offer as portion of the same file number, at page 473, Order for Sale of receiver's certificates, dated May 29th, 1919.

Received as Government's Exhibit No. 94.

Mr. Matthews: I now offer File No. 97, copy found at page 478, Opinion of Mayer, J., in re issue of receiver's certificates, dated May 29th, 1919.

Received as Government's Exhibit No. 95.

1512 Mr. Matthews: I now offer File No. 104, copy to be found at page 495, being Petition approving the B. R. T. agreement with respect to Brooklyn Heights Railroad Company, the offer including Notice of Motion and the Petition itself, dated June 5th, 1919.

Received as Government's Exhibit No. 96.

Mr. Matthews: I likewise offer File No. 119, copy found at page 572, Order dated June 18th, 1919, extending the time of the New York Municipal Corporation, New York Consolidated Railroad Company and Brooklyn Rapid Transit Company to answer to July 21, 1919.

Received as Government's Exhibit No. 97. 1513

Mr. Matthews: Next I offer File No. 120, page 575, Affidavit of the Corporation Counsel in opposition to application of the Receiver for authority to exchange properties of Brooklyn City Railroad Company, the same being being dated June 11th, 1919.

Received as Government's Exhibit No. 98.

Mr. Matthews: I next offer File No. 123, page 4, Report of the Special Master in re payment of interest on first mortgage bonds, dated June 26th, 1919.

Received as Government's Exhibit No. 99. 1514

Mr. Matthews: I also offer File No. 124, page 587, Application of Receiver for instructions,—with respect to instructions for preserving the corporate existence of defendants, that offer includes notice of motion dated June 26th, 1919, and the application itself.

Received as Government's Exhibit No. 100.

Mr. Matthews: I offer File No. 125, page 593, Order dated June 27th, 1919, authorizing receiver to make expenditures preserving corporate existance of defendant companies.

Received as Government's Exhibit No. 101.

Mr. Matthews: I offer File No. 126, copy page 595, application of receiver for confirmation of Special Master's report, repayment of interest, page 595, dated June 26th, 1919. The offer includes Notice of Motion as well as Application. 1515

Received as Government's Exhibit No. 102.

Mr. Matthews: I also offer File No. 127, page 601, Order dated June 27th, directing receiver to pay no interest on first and refunding gold mortgage bonds of Brooklyn Rapid Transit Company.

Received as Government's Exhibit No. 103.

1516 Mr. Matthews: I likewise offer File No. 128, page 603, Application of Receiver for time within which to affirm or disaffirm contracts. The offer includes Notice of Motion dated June 26th, 1919, as well as application.

Received as Government's Exhibit No. 104.

Mr. Matthews: Likewise I offer File No. 129, page 610, Order dated June 27th, 1919, extending time within which to affirm or disaffirm contracts to December 31st, 1919.

Received as Government's Exhibit 105.

Mr. Matthews: Also I offer File No. 130, page
1517 612, Application of Receiver for confirmation of Special Master's report in repayment of interest on mortgage bonds, etc.; that offer includes not only application, but also Notice of Motion dated June 26th, 1919.

Received as Government's Exhibit No. 106.

Mr. Matthews: I now offer File No. 131, page 619, Order dated June 27th, 1919, confirming the Special Master's report and directing the receiver to pay no interest, etc.

Received as Government's Exhibit No. 107.

Mr. Matthews: I now offer Opinion of Circuit
1518 Court of Appeals in the matter of receivers certificate, page 624.

Received in evidence as Government's Exhibit 108.

Mr. Matthews: For the sake of convenience I suggest that we mark in our copies of Volume 2, No. 198, page 977, Opinion of Mayer, J., in re report of Stone & Webster, as Exhibit 26, which has heretofore been offered and received in evidence as that exhibit. This is merely a copy of it in the printed record of the proceedings at page 977.

At this point I would like to suspend the offering of these exhibits and call Mr. Halloran.

1519

WILLIAM F. HALLORAN, JR., a witnss called in behalf of the United States, being duly sworn, testified as follows.

Direct Examination by Mr. Matthews:

Q. Mr. Halloran what is your business? A. I am a lawyer, managing clerk in the office of Winthrop & Stimson.

Q. How long have you been such? A. About three years.

Q. You have then been their managing clerk during all the time they represented the receiver in the New York Railway matters? A. Yes, I have. 1520

Q. Are you familiar with the service of papers and proceedings that have taken place from that office in that case? A. I am.

Q. Did you receive service of papers served upon them as counsel for Job E. Hedges, receiver of the New York Consolidated Railways Company? A. I did.

Q. Have you custody of the filing of all these legal papers, including all papers in these proceedings? A. Yes, I have.

Q. Do you also keep the correspondence in connection with the receivership? A. Yes, sir. 1521

Q. Were the proceedings in the New York Railway matter printed? A. They were, yes, sir.

Q. Were printed copies of the proceedings served on the Corporation Counsel? A. They were.

Q. Several of them? A. They were, yes sir.

Mr. Mooney: Now as to that I object, as heretofore, upon the ground that the papers sent to the Corporation Counsel are not binding upon the Comptroller, as the Cor-

1522

poration Counsel in no sense represents the Comptroller either in law or in fact.

The Witness: Yes.

Mr. Mooney: My motion will be to strike out the answer as well as to object to the question, the answer having been given before I could put my objection on the record.

Q. I wish you would state, Mr. Halloran what parts of the printed record were furnished by your office to the Corporation Counsel. Please state the

1523 dates they were so furnished.

Mr. Mooney: Same objection.

Examination of Mr. Halloran suspended.

Mr. Matthews: I now offer in evidence the following papers from the files of the Court in the suit entitled "The American Brake Shoe & Foundry Company, complainant, against the New York Railways Company, defendant, the Farmers Loan & Trust Company, trustee, complainant, against the New York Railways Company, Job E. Hedges, as Receiver, of the said railway

1524 company, and the American Brake Shoe & Foundry Company, defendant, which is now docketed as Equity Consolidated Cause E. Consolidated 16/151." The papers now offered will be referred to by page number of volume 1, part 1 of the receivership records, which contain copies of the papers to be offered.

Page 1, I offer the Bill of Complaint verified on March 20th, 1919, in the action of the American Brake Shoe & Foundry Com-

1525

pany against New York Consolidated Railway Company.

Received as Government's Exhibit No. 109.

Mr. Matthews: Likewise page 15, the answer verified March 20th, 1919, in the same suit.

Received as Government's Exhibit No. 110.

Mr. Matthews: Page 18, Order appointing temporary receiver dated March 20th, 1919.

1526

Received as Government's Exhibit No. 111.

Mr. Matthews: Page 23 receiver's bond dated March 20th, 1919.

Received as Government's Exhibit No. 112.

Mr. Matthews: Page 26, Minutes on Return of Order to Show Cause why Receivership should not be continued, dated March 31st, 1919.

Received as Government's Exhibit No. 113.

1527

Mr. Matthews: Page 44, Affidavit of Corporation Counsel dated March 31, 1919, that offer includes Exhibit A at page 79.

Received as Government's Exhibit 114.

Mr. Matthews: Also page 106, which is Exhibit B, and page 109, which is Exhibit C, are offered as part of Exhibit 114.

I offer at page 114 Petition of the National Surety Company, dated March 31st, 1919, reform of order appointing permanent receiver.

Received as Government's Exhibit No. 115.

1528

WILLIAM F. HALLORAN (resumes the stand).

Direct Examination by Mr. Matthews (continued):

The Court: I overrule this objection, because reference is made in the letter complained of in the information, as I recall it, to himself and other members of the Board of Estimate and Apportionment, or words to that effect.

Mr. Mooney: He does not—that is the Corporation Counsel does not represent the

1529

Board of Estimate and Apportionment in any sense. I want to say here that the record is in this situation, as I understand it: Your Honor has repeatedly ruled with respect to a certain class of evidence that that which went to the Corporation Counsel or went to other members of the official administration of the City of New York and that to the Comptroller officially or the Board of Estimate and Apportionment as such was not "competent," and in other parts of the record, if I can read it aright,

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your Honor has admitted evidence of that kind and class. Now whether it has been that Counsel has not always been as astute and ready to raise the point on the record, I do not know, but my remarks are now made only for the purpose of bringing to your Honor's mind the objection to the point that on certain occasions you have excluded evidence of this kind.

The Court: I cannot at this moment recall the Court's ruling on each and every objection, but I can state it broadly in relation to the questions involved. As I recall I ex-

cluded all conversations with any others but the defendant, that is to say, I excluded as I recall, the effort of the Government to introduce in evidence certain correspondence with the Corporation Counsel which might or might not have represented others, by the Receivers or their counsel in respect to certain subject matter or discussions between the Receivers and their counsel or writings having to do with certain matters such as the form of the expert accountant's report and the like. But when it comes to official records of the proceedings had in these receiver's suits, and which records are filed and it is sought to question this witness to show that these records were constantly sent to the Corporation Counsel that seems to me to be entirely relevant, as showing, which I assume is the purpose of the Government, the open character and the method of procedure, under the direction of the Court, of the Receivers and their counsel.

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Now, that broadly stated, without limiting myself to anything in detail is the statement of the differentiation, which perhaps Counsel has sought to ascertain with respect to my ruling.

1533

Mr. Mooney: We content ourselves with an exception to such rulings as are contained in your Honor's remarks; and I will say only about three words and that is, in law—I am not speaking of fact—but in law these documents when they reach the Corporation Counsel are utterly inaccessible to the Comptroller of the City of New York.

1534

Q. I think the next question was this: Give the dates that the several parts of the printed records were furnished to the Corporation Counsel.

Mr. Mooney: Same objection.
The Court: Same ruling.
Mr. Mooney: I object.

A. The printed record to date contains two volumes, each containing two parts. Volume one, part one, was served on the Corporation Counsel in
1535 June, 1919, and volume one, part two, was served in July, 1919; volume two, part one, was served August, 1919. Volume two, part two, was served sometime in January of this year.

Q. I am not interested in that, what you served this year.

The Court: Strike out so much of the testimony as refers to January of this year.

Q. I show you Government's Exhibit 27 for Identification and ask you if you have the original letters that were received by your office contained
1536 in that exhibit and also your office carbons of those that went out from your office? A. I have, yes, sir.

Q. Did they come in and go out in the regular course of business? A. They did.

Mr. Matthews: I offer then Government's Exhibit No. 27 for Identification in evidence, exhibiting the original papers to defendant's counsel, and I would like to have the copies marked in place of the originals, unless there is some point in having the originals. My desire is that the originals be returned to the files.

1537

Mr. Mooney: We make an objection to each and every of the papers offered in evidence upon the ground that none of them is addressed to, nor so far as appears was delivered to, or brought to the attention of the defendant in this case and therefore that they are incompetent and improper as against him.

The Court: Objection sustained.

Mr. Matthews: May the copies be marked with the same force and effect as if they were the originals?

1538

The Court: Yes, certainly.

Mr. Matthews: I would like to have these made a part of the record. I am not trying to connect the defendant with these, but I think we ought to show on the record what the fact is with respect to this Stone and Webster matter, which was a matter of record, and that the defendant with reasonable diligence could have found out just what the situation was, one of the charges in the information being that the statement made in this regard was in disregard of the truth.

1539

The Court: Objection sustained.

Q. Did you have charge of serving the Corporation Counsel with notices, pleadings and motions in the receivership? A. I did.

Mr. Mooney: Same objection.

The Court: Objection overruled.

Mr. Mooney: Exception.

Q. And did you cause the Corporation Counsel to be served with pleadings, notices, orders and the like?

1540

Mr. Mooney: Same objection.
The Court: Objection overruled.
Mr. Mooney: I except.

A. I did.

Cross Examination by Mr. Mooney:

Q. Have you ever met Mr. James L. Quackenbush in the performance of your duties? A. Not personally.

1541

Q. Have you ever met Mr. Edward W. Sayre in the performance of your duties? A. No, sir.

Q. Or Mr. B. C. Moorehead? A. No, sir.

Mr. Matthews: The offer of Exhibit 115 includes not only the petition, but the notice thereto annexed, pages 122, Exhibit A, 123 Exhibit B, 132 Exhibit C.

I now offer Order appointing Job E. Hedges permanent receiver, copy found at page 142, the Order being dated March 31st, 1919.

Received in evidence as Government's Exhibit 116.

1542

Mr. Matthews: Counsel on both sides having printed copies of the record are requested to mark their printed copies.

I now offer extension of bond of temporary receiver to cover duties of Receiver, found at page 147.

Received in evidence as Government's Exhibit 117.

Mr. Matthews: I now offer Petition of Receiver for Order appointing Counsel, page 149, dated April 2nd, 1919.

Received in evidence as Government's Exhibit 118.

Mr. Matthews: I now offer Order ap- 1543
pointing Receiver's Counsel dated April 2nd, 1919, copy at page 151.

Received in evidence as Government's Exhibit 119.

Mr. Matthews: I offer in evidence minutes of hearing before Judge Mayer on matter of extension of bond, printing of record, petition for leave to continue certain insurance, matter of affirmance or disaffirmance of contracts, matter of presentation of claims, matter of continuation of welfare work, beginning at page 152.

Received as Government's Exhibit No. 1544
120.

Mr. Matthews: I now offer Notice of Motion for Order authorizing receiver to print receivership record, found at page 158, I offer petition verified April 21st, 1915, for Order authorizing receiver to print receivership record as a part of Exhibit 121, that is down to page 160, likewise Order authorizing receiver to print receivership record, page 162. I offer these three documents as one exhibit.

Received as Government's Exhibit 121. 1545

Mr. Matthews: I now offer Notice of Motion for Order fixing time for presentation of claim on original reports of receiver, copy found at page 185.

The offer including the Order for presentation of claims at page 187, dated April 10th, 1919.

Received in evidence as Government's Exhibit 122.

Mr. Matthews: I now offer the Order to show cause why leased lines should not be

1546 returned to the lessor, The Eighth Avenue Railroad Company, copy to be found at page 192, together with the petition on which that order was based, copy to be found at page 193, as one exhibit.

Received as Government's Exhibit 123.

Mr. Matthews: And the offer includes, of course, the exhibits annexed to the petition down to and including page 237.

I now offer the answer of the Receiver, dated April 21st, 1919, to the petition of The Eighth Avenue Railroad Company, page 238.

1547 Received as Government's Exhibit 124.

Mr. Matthews: The offer including the exhibits annexed to the answer.

I now offer the affidavit of the Corporation Counsel dated April 21st, 1919, in answer the petition of The Eighth Avenue Railroad Company, copy found at page 251.

Received as Government's Exhibit 125.

Mr. Matthews: I now offer Order to show cause why leased lines should not be returned to the lessor, The Ninth Avenue Railroad Company, copy found at page 260.

1548 Received as Government's Exhibit 126.

Mr. Matthews: That offer includes the petition on which order to show cause was based, found at page 262, with the exhibits thereto annexed, down to and including page 301, beginning at page 260 down to page 301 and ask that they be marked as one exhibit.

I now offer Answer of the Receiver, dated April 21st, 1919, to the Petition of The Ninth Avenue Railroad Company, page 302.

Received as Government's Exhibit 127.

Mr. Matthews: That offer includes the exhibits thereto annexed, page 316. 1549

I now offer the affidavit of the Corporation Counsel—

Mr. Wolbarst: I object to the inclusion in the last exhibit of Exhibits A, B and C annexed to the answer of the Receiver, pages 315 and 316, because they were not indicated in the Bill of Particulars.

Mr. Matthews: The exhibits objected to are Exhibit A, page 315, and Exhibit B on page 316. They constitute a part of and were annexed to the answer of the Receiver. The answer of the Receiver was designated in the Bill of Particulars as beginning at page 302 of the receivership record. 1550

I now offer affidavit of Corporation Counsel verified April 21st, 1919, in answer to petition of Ninth Avenue Railroad Company, page 317. That affidavit includes page 317 to page 327 and is dated April 21st, 1919.

Received in evidence as Government's Exhibit 128.

Mr. Matthews: I now offer in evidence stenographer's minutes of hearing of Eighth Avenue Railroad and Ninth Avenue Railroad petitions, beginning at page 328, and dated April 21, 1919. 1551

Received as Government's Exhibit No. 129.

Mr. Matthews: I now offer Order denying petition of Eighth Avenue Railroad Company dated April 30th, 1919, found at page 362.

Received as Government's Exhibit No. 130.

1552 Mr. Matthews: I likewise offer in evidence Order denying petition of Ninth Avenue Railroad Company, dated April 30th, 1919, found at page 363.

Received in evidence as Government's Exhibit No. 131.

Mr. Matthews: I now offer in evidence stenographer's minutes of hearing reappointment of Special Master, found at page 364, dated April 21st, 1919.

Received as Government's Exhibit No. 132.

1553 Mr. Matthews: I now offer in evidence Order appointing Special Master and providing for the proof of claims other than tort claims, found at page 368.

Received in evidence as Government's Exhibit 133.

Mr. Matthews: I now offer in evidence Petition of Receiver for leave to employ engineers and accountants to make examinations of property and finances, page 383. The date is April 25th, 1919.

Received as Government's Exhibit No. 134.

1554 Mr. Matthews: I now offer in evidence Order directing Receiver to employ engineers and accountants to make examination of the property and finances, date April 28th, 1919, page 384.

Received in evidence as Government's Exhibit 135.

Mr. Matthews: I now offer in evidence stenographer's minutes of hearing on Motion of Receiver for leave to employ engineers and accountants, etc., dated April 28th, 1919, page 386.

Received as Government's Exhibit 136.

1555 Mr. Matthews: I now offer in evidence stenographer's minutes of hearing in the matter of paving contract, matter of filing accounts of Receiver, beginning at pages 398 and 401 and following.

Received as Government's Exhibit 137.

Mr. Matthews: That will include first all the hearing on page 411 and on and will include all of those pages, I think I had better offer them consecutively down to page 413.

I now offer Petition re Broadway & Seventh Avenue Co. lease, found at page 415.

1556 Received as Government's Exhibit 138.

Mr. Matthews: I now offer in evidence Order authorizing Receiver to make certain payments with respect to Broadway & Seventh Avenue Railway Company lease, found at page 425, dated May 29th, 1919.

Received as Government's Exhibit 139.

Mr. Matthews: I now offer in evidence affidavit of Corporation Counsel, found at page 427, dated May 29th, 1919.

Received as Government's Exihibt 140.

1557 Mr. Matthews: I now offer stenographer's minutes of hearing of Matter of Municipal Ferry and proceedings filed by the Receiver in reference to 23rd Street rentals, interest payments, with the exception of contract and tort claims. This is referred to as the second hearing, particularly pages 466 and following, dated June 10th, 1919, it begins at page 464.

Received as Government's Exhibit 141.

Mr. Matthews: I now offer petition of Farmers Loan & Trust Company for leave to foreclose adjustment mortgage, page 497.

1558 Received as Government's Exhibit 142.

Mr. Matthews: I likewise offer in evidence Order granting the Farmers Loan & Trust Company leave to file bill of foreclosure, found at page 502.

Received as Government's Exhibit 143.

Mr. Matthews: Dated June 6th, 1919.

I now offer in evidence foreclosure bill, page 504.

Received as Government's Exhibit 144.

Mr. Matthews: Dated June 9th, 1919. That offer includes also Exhibit A to ad-

1559 justment mortgage on page 610 and following down through page 826.

I now offer in evidence stenographic minutes of hearing on South Ferry transfer matter, found on page 827, dated June 12th, 1919.

Received in evidence as Government's Exhibit 145.

Mr. Matthews: I now offer in evidence second petition of Eighth Avenue Railroad Company for the return of its leased property, page 870, dated June 16th, 1919.

1560 Received as Government's Exhibit 146.

Mr. Matthews: I likewise offer in evidence second petition of The Ninth Avenue Railroad Company for the return of its leased property, page 880. The date of that is June 16, 1919.

Received as Government's Exhibit 147.

Mr. Matthews: I likewise offer in evidence Order extending time to file claims, page 897, dated June 20th, 1919.

Received as Government's Exhibit 148.

Mr. Matthews: I offer now in evidence petition with respect to proposed proffer for

operation over the Williamsburg Bridge, found at page 930, dated June 18th, 1919. 1561

Received as Government's Exhibit 149.

Mr. Matthews: That offer includes the exhibits annexed to the petition and goes down through page 964, which is the end of volume one, part two.

I will now take up volume two, page one.

I offer in evidence answer of the Receiver to second petition of The Eighth Avenue Railroad Company found at page 975, dated June 24, 1919.

Received as Government's Exihibt 150.

Mr. Matthews: I now offer in evidence, at page 978, answer of the Receiver to the petition of The Ninth Avenue Railroad Company, dated June 24th, 1919. 1562

Received as Government's Exhibit No. 151.

Mr. Caffey: I offer, at page 1036, Petition for consolidation of creditor's bill and adjustment of mortgage foreclosure action, Equity Causes 16/29 and 16/127.

Received as Government's Exhibit 152.

Mr. Caffey: At page 1052, I offer in evidence stenographer's minutes dated June 20th, 1919, extention of time for filing of claims. That begins at page 1051. 1563

Received as Government's Exhibit 153.

Mr. Caffey: I offer in evidence minutes of hearing re liquidation of tort claims, re consolidated of creditors and foreclosure action, pages 1054, 1055 and following.

Mr. Wolbarst: I object to 1054 as not having been indicated in the bill of particulars.

1564 Received as Government's Exhibit 154.

Mr. Matthews: There is no objection to limiting the offer to the portion indicated in the bill of particulars. 1054 merely contains the appearances and the title.

Mr. Wolbarst: Objection withdrawn.

Mr. Matthews: Page 1058, I offer in evidence Order appointing Receiver under adjustment mortgage and consolidating causes dated July 1, 1919.

Received as Government's Exhibit 155.

Mr. Matthews: I offer in evidence min-
1565 utes of hearing beginning on page 1073. The portion offered commencing on page 1108, dated June 25th, 1919, motion to extend and to consolidate the receivership.

Received as Government's Exhibit 156.

Mr. Matthews: Likewise minutes beginning on page 1123 on application of The Ninth Avenue Railroad Company, the same date, June 25th, 1919.

Received as Government's Exhibit 157.

The Court: We will now take a recess until 2. P. M.

1566

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2 P. M., June 8th 1920.

PRESENT:

The Court.
Same Counsel.

Mr. Caffey: At page 1146, I offer in evidence consent of Job E. Hedges, receiver, to adjustment mortgage and foreclosure suit and extension of bond, dated July 17th, 1919.

Received as Government's Exhibit 158. 1567

Mr. Caffey: Page 1148, extention of bond of Receiver in creditor's suit to duties of Receiver in adjustment mortgage foreclosure suit.

Received as Government's Exhibit 159.

Mr. Caffey: Page 1152, affidavit of the Corporation Counsel upon the application of Receiver for instruction re operation of cars on the Williamsburg Bridge.

Received as Government's Exhibit 160.

Mr. Caffey: Page 1163, minutes of hearing in matter of Eighth Avenue Railroad 1568 Company and Ninth Avenue Railroad Company, etc.

Received as Government's Exhibit 161.

Mr. Caffey: Page 1236, minutes of hearing July 14, 1919, petition for payment of interest on $400,000. loan, to the Guarantee Trust Company.

Received as Government's Exhibit 162.

Mr. Caffey: Page 1140, minutes of hearing matter of The Eighth Avenue Railroad Company, dated July 14th, 1919.

Received as Government's Exhibit 163. 1569

Mr. Caffey: Page 1256, order directing return of property of Eighth Avenue Railroad Company, dated July 15th, 1919.

Received as Government's Exhibit 164.

Mr. Caffey: Page 1264, order extending receivership to refunding mortgage foreclosure dated July 14, 1919.

Received as Government's Exhibit 165.

Mr. Caffey: Page 1266, petition for extention of receivership to refunding mortgage foreclosure, dated July 14, 1919.

1570 Received as Government's Exhibit 166.

Mr. Caffey: Page 1272, Order granting Guarantee Trust Company leave to sue, dated July 11th, 1919.

Received as Government's Exhibit 167.

Mr. Caffey: Page 1274, petition of Guarantee Trust Company for leave to sue, dated July 11th, 1919.

Received as Government's Exhibit 168.

Mr. Caffey: Page 1282, memorandum of agreement between the Receiver and The Eighth Avenue Railroad Company, dated
1571 July 15th, 1919.

Received as Government's Exhibit 169.

Mr. Caffey: Page 1297, refunding mortgage foreclosure bill, verified July 11th, 1919.

Received as Government's Exhibit 170.

Mr. Caffey: Page 1401, Exhibit A to the bill just referred to.

Received as Government's Exhibit 171.

Mr. Caffey: Page 1625,—this is the first in part two of volume two,—Plan of operation proposed by Eighth Avenue Railroad Company on its application for return of
1572 its lines.

Received as Government's Exhibit 172.

Mr. Caffey: Page 1628, plan of operation by Ninth Avenue Railroad Company on its application for return of its lines.

Received as Government's Exhibit 173.

Mr. Caffey: Page 1633, report of receiver re transfer charge proceedings, dated July 31, 1919.

Received as Government's Exhibit 174.

Mr. Caffey: Page 1636, Schedule A, to the paper last referred to.

Received as Government's Exhibit 175. 1573

Mr. Caffey: Page 1648, Schedule B, to the same paper.

Received as Government's Exhibit 176.

Mr. Caffey: Page 1624, Schedule C to the same paper.

Received as Government's Exhibit 177.

Mr. Caffey: Page 1661, answer of New York Railways Company to refunding mortgage foreclosure bill, verified August 1, 1919.

Received as Government's Exhibit 178.

Mr. Caffey: Page 1740, answer of the defendant Job E. Hedges, as the Receiver 1574
of New York Railways Company to bill of complaint of the Farmers Loan & Trust Company, trustee, verified August 29, 1919.

Received as Government's Exhibit 179.

Mr. Caffey: Page 1746, Order permitting Central Union Trust Company of New York to sue Receiver Re South Ferry Railroad Company foreclosure, dated September 11, 1919.

Received as Government's Exhibit 180.

Mr. Caffey: Page 1748, petition for leave to sue signed by Central Union Trust Company of New York, verified September 10th, 1575
1919.

Received as Government's Exhibit 181.

Mr. Caffey: Page 1755, bill of complaint of the South Ferry Railroad Company, mortgage foreclosure.

Received as Government's Exhibit 182.

Mr. Caffey: Page 1776, Exhibit A, to the last paper.

Received as Government's Exhibit 183.

Mr. Caffey: Page 1787, Petition for con-

1576 solidation of first real estate and refunding mortgage foreclosure with consolidated clause.

Received as Government's Exhibit 184.

Mr. Caffey: Page 1794, order consolidating first real estate and refunding mortgage foreclosure with prior consolidated cause, dated September 11, 1919.

Received as Government's Exhibit 185.

Mr. Caffey: Page 1797, petition for instructions Re Storage Battery Lines.

Received as Government's Exhibit 186.

1577 Mr. Caffey: Page 1826, order directing temporary discontinuance of Storage Battery Lines, dated September 12th, 1919.

Received as Government's Exhibit 187.

Mr. Caffey: Page 1828, Notice Re Receiver's affidavit, supplemental to Answers and Petitions of 9th Avenue Railroad for return of leased property.

Received as Government's Exhibit 188.

Mr. Caffey: Page 1831, receiver's affidavit supplemental to answers to Petition of 8th Avenue Railroad Company for return

1578 of leased property, dated September 4th, 1919.

Received as Government's Exhibit 189.

Mr. Caffey: Page 1841, order to show cause, Re 8th Avenue Railroad transfer arrangement, dated September 10th, 1919.

Received as Government's Exhibit 190.

Mr. Caffey: Page 1843, petition for instructions Re 8th Avenue Railroad transfer arrangement, dated September 9th, 1919.

Received as Government's Exhibit 191.

Mr. Caffey: Page 1849, affidavit of re-

ceiver's auditor used on the applications 1579
enumerated below, verified September 12th, 1919.

Received as Government's Exhibit 192.

Mr. Caffey: Page 1890, part of minutes of hearing, dated September 11th, 1919, entitled "Re consolidation of first real estate and refunding mortgage foreclosure."

Received as Government's Exhibit 193.

Mr. Caffey: Page 1927, part of minutes of hearing of September 11, 1919, entitled "Re South Ferry R. R. Co., foreclosure."

Received as Government's Exhibit 194.

Mr. Caffey: Page 1928, part of minutes 1580
of hearing entitled "Re Storage Battery Line."

Received as Government's Exhibit 195.

Mr. Caffey: Page 1948, part of minutes of same hearing entitled "Re discontinuance of transfers with 8th Avenue R. R."

Received as Government's Exhibit 196.

Mr. Caffey: Page 1977, minutes of hearing of September 22nd, 1919, Re Williamsburg Bridge operation.

Received as Government's Exhibit 197.

Mr. Caffey: Page 1982, affidavit of John 1581
Bauer, Re Williamsburg Bridge operation, verified September 11, 1919.

Received as Government's Exhibit 198.

Mr. Caffey: Page 1987, affidavit of Frederick T. Wood, Re Williamsburg Bridge operation.

Received as Government's Exhibit 199.

Mr. Caffey: The above affidavit was verified September 19, 1919.

1582 Page 2011, minutes of hearing of September 24, 1919, entitled "Re Discontinuance of transfers with 8th Avenue Railroad Company.

Received as Government's Exhibit 200.

Mr. Caffey: Page 2019, minutes of hearings of September 26, 1919, Re 8th Avenue Railroad transfers and 9th Avenue Railroad.

Received as Government's Exhibit 201.

Mr. Caffey: Page 2048, minutes of hearing of October 1, 1919, Re 9th Avenue Rail-

1583 road.

Received as Government's Exhibit 202.

Mr. Caffey: Page 2069, affidavit of Frederick T. Wood re return of certain cars to 9th Avenue Railroad Company, verified October 1, 1919.

Received as Government's Exhibit 203.

Mr. Caffey: Page 2083, order directing return of property to the 9th Avenue Railroad Company, dated September 26th, 1919.

Received as Government's Exhibit 204.

Mr. Caffey: Page 2097, order approving

1584 the agreement relating to the return of property to the 9th Avenue Railroad Company by the receiver of the New York Railway Company and directing the return of certain additional cars, dated September 30th, 1919,

Received as Government's Exhibit 205.

Mr. Caffey: Page 2000, schedule one to the order.

Received as Government's Exhibit 206.

Mr. Caffey: Page 2102, schedule 2 to the same order.

Received as Government's Exhibit 207.

Mr. Caffey: Page 2114, Order directing payment of interest due October 1, 1919, on 34th Street Crosstown Railway bonds, dated September 30th, 1919. 1585

Received as Government's Exhibit 208.

Mr. Caffey: Page 2116, Receiver's petition Re interest on 34th Street Crosstown Railway Company, dated September 27th, 1919.

Received as Government's Exhibit 209.

Mr. Caffey: In the matter on the Interborough Consolidated Corporation bankrupt, bankruptcy docket number 26690, I offer creditor's petition in bankruptcy dated March 21st, 1919, being No. 1 of paragraph III, Bill of Particulars. 1586

Received as Government's Exhibit 210.

Mr. Caffey: Petitioning Creditors' application for appointment of Receiver pending adjudication of bankruptcy, dated March 21st, 1919, in the same proceedings, being No. 2 in paragraph III, Bill of particulars.

Received as Government's Exhibit 211.

Mr. Caffey: Next, Order appointing James R. Sheffield, Esq., temporary receiver of the property, assets and effects of the Interborough Consolidated Corporation, dated March 31st, 1919, in the same proceedings, being No. 3 of paragraph III of the Bill of Particulars. 1587

Received as Government's Exhibit 212.

Mr. Caffey: Next, adjudication in bankruptcy and order of reference, dated March 28th, 1919, in the same proceedings, being No. 4 of paragraph III of the Bill of Particulars, dated March 28th, 1919.

Received as Government's Exhibit 213.

1588 Mr. Caffey: Next, certificate of trustee's election at creditors' meeting of April 25th, 1919, and approval by Referee in the same proceedings, being No. 5 of paragraph III of the Bill of Particulars.

Received as Government's Exhibit 214.

Mr. Caffey: Next, schedule in bankruptcy of the Interborough Consolidated Corporation, bankruptcy dated April 14th, 1919, in the same proceedings, being No. 6 of paragraph III of the Bill of Particulars.

Received as Government's Exhibit 215.

1589 Mr. Caffey: Next, Order dated April 26th, 1919, by Macgrane Coxe, Referee in Bankruptcy, approving the bond of James R. Sheffield as trustee in bankruptcy of the estate of Interborough Consolidated Corporation, bankrupt, being No. 7 of the same paragraph of the Bill of Particulars.

Received as Government's Exhibit 216.

Mr. Caffey: Next, Order of Referee authorizing Trustee to retain Messrs. Leventritt Cook, Nathan & Lehman as his attorneys and counsel, dated May 12th, 1919, in the same proceeding, being No. 8 in paragraph III of the Bill of Particulars.

1590

Received as Government's Exhibit 217.

Mr. Caffey: Next, Notice of Creditors, dated May 21st, 1919, in the same proceeding, being No. 9 of paragraph III of the Bill of Particulars.

Received as Government's Exhibit 218.

Mr. Caffey: Next, Report of Referee on Receiver's account, etc., dated June 7th, 1919, in the same proceeding, being No. 10 of paragraph III of the Bill of Particulars.

Received as Government's Exhibit 219.

Mr. Caffey: Next, Order of June 24th, 1919, signed by Hon. Julius M. Mayer, United States District Judge, concerning Referee's report, etc., in the same proceedings, being No. 11 of the same paragraph of the Bill of Particulars. 1591

Received as Government's Exhibit 220.

Mr. Caffey: I next offer first report of James R. Sheffield, as Trustee of the estate of Interborough Consolidated Corporation, bankrupt, dated July 30, 1919, in the same proceeding, being No. 12, paragraph III of the Bill of Particulars. 1592

Received as Government's Exhibit 221.

Mr. Caffey: Next, letter dated September 4th, 1919, to Honorable Julius M. Mayer, signed by Stone & Webster, of 120 Broadway, New York City, in the same proceeding, being No. 13 of paragraph III of the Bill of Particulars.

Received as Government's Exhibit 222.

Mr. Caffey: Memorandum of Mayer, J., dated September 6th, 1919, in the same proceeding, being No. 14 of paragraph III of the Bill of Particulars. 1593

Received as Government's Exhibit 223.

Mr. Caffey: Letter dated September 8th, 1919, signed James R. Sheffield, Trustee, Interborough Consolidated Corporation, Job E. Hedges, Receiver, New York Railways Company and Lindley M. Garrison, Receiver of Brooklyn Rapid Transit Company, being No. 15, paragraph III of the Bill of Particulars.

Received as Government's Exhibit 224.

Mr. Caffey: Next, Order dated October 2nd, 1919, by Macgrane Coxe, Referee in

1594 Bankruptcy, extending to December 1, 1919, the time of James R. Sheffield to file a second report as Trustee in the Interborough Bankruptcy proceedings, of the estate of the Interborough Consolidated Corporation, bankrupt, being No. 16, paragraph III of the Bill of Particulars.

Received as Government's Exhibit 225.

Mr. Caffey: If the Court please, we have endeavored diligently to serve a subpoena upon one witness whom we desire to call. We have not been able to serve him or secure
1595 his presence yet. His testimony is merely cumulative. If he were present I should like to put him on the stand, and I wish to give notice that in the event we succeed in serving a subpoena upon him I shall ask leave to reopen the case to the extent of being allowed to put that witness on the stand.

With that reservation the Government rests.

Mr. Mooney: We do not recognize any reservation in a case of this kind, your Honor.

1596 The defendant now makes the following motions:

First: That another judge be designated to hear the proceeding for the reason already stated in the stenographer's minutes.

Second, that the judge presiding at this hearing is a witness to material facts in the proceeding and should be called and examined as such by the Government.

Third, that the defendant is prevented from calling the judge presiding at this pro-

ceeding as a witness in the defendant's be- 1597
half, because the judge may not be properly called as a witness.

Now having made these motions I pause.

The Court: Motions denied.

Mr. Mooney: I except to the denial of each motion.

The defendant or respondent moves to dismiss the proceeding upon each of the grounds, separately stating them, set forth in the Motion to Quash and in the demurrer, and upon the further grounds:

The Court is without jurisdiction.

The Court has no jurisdiction of the per- 1598
son of the respondent.

Because the proofs fail to establish any offense.

Because the proofs fail to establish any misbehavior in the presence of the Court.

Because the proofs fail to establish any misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice.

Because the proofs fail to establish any contempt in the face of the Court or constructively in its presence. 1599

Because the proofs fail to establish that any publication was made by the respondent of or concerning the Court.

Because the proofs show that the Court was acting in an administrative capacity with respect to the matters embraced in the alleged contemptuous communication.

Because the proofs fail to establish any contempt in the face of the Court or constructively in its presence.

1600 Because the proofs fail to establish that any publication was made by the respondent of or concerning the Court.

Because the proofs establish that the letter set out therein was a privileged communication.

Because the proofs show that the respondent in the writing of the letter was acting within a privileged sphere.

Because the proofs establish that the letter therein set out and complained of was an official communication from one public
1601 official to another public official, written and dispatched of and concerning public business.

Because the proofs fail to establish that the letter therein set out and complained of was written with a view of influencing the Court with respect to the decision of any matter or issue then pending before the Court for decision or judicial determination.

Because the proofs establish that the letter therein set out and complained of was not written for the purpose of obstructing the administration of justice.

1602 Because the proofs fail to establish any criticism of the Court with respect to a cogitation of the Court then in process of development.

Because the proofs fail to establish that the publication of the letter complained of was ever authorized by the respondent.

Because the proofs fail to establish that the letter complained of was ever authorized by the respondent to be published with the intent or view of obstructing the administration of justice.

Because the proofs fail to establish that the letter complained of was ever by this respondent authorized to be published with the view or intent of influencing the judicial determination or decision of the Court upon or with respect to any matter or issue then pending before the Court for judicial determination or decision. 1603

Because the letter from the respondent as Comptroller to Nixon as Commissioner was itself, as a matter of law, a public document which the respondent was powerless to suppress or withhold from publication. 1604

1. That the proofs show that the Judge mentioned in the alleged contemptuous communication was on the occasions therein referred to acting in an administrative and not in a judicial capacity; and that the Court had itself so declared in one of the decisions or opinions of the Court, that has been offered in evidence by the Government; and that a contempt is not susceptible of being committed against a Judge acting in an administrative capacity.

1605

2. That the proofs show there was no publication by the defendant.

3. That the proofs show that at the time the Court ordered the institution of his proceeding there had been no publication.

4. That the proofs show that at the time the Court ordered the institution of this proceeding there had been no publication in any newspaper.

1606

5. That the proofs show that at the time the Court ordered the institution of this proceedings there had been no publication other than the reading of the alleged contemptuous communication in the conference held by the Public Service Commission.

6. That the defendant is sought to be prosecuted in this proceeding for a publication not made by him but by the Public Service Commissioner, Mr. Nixon.

1607

7. That no misconduct was imputed to the Court (even within the construction ascribed by the Government and announced by the judge presiding at this hearing as applicable to the alleged contemptuous writing), as no duty or obligation rested on the Court as matter of law to afford to the writer or to other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of the various public corporations holding franchises to operate in the streets of New York—neither the writer

1608

nor the Board, nor the City was a party to the proceedings referred to and was not entitled as matter of legal right to access thereto, that is, to access to original sources of information.

Now I repeat the last variation as follows:

That no misconduct was imputed to the Court, as no duty or obligation rested on the Court as matter of law, after the Court had denied the application for intervention and after the Court had refused to appoint

the co-receiver designated or nominated by 1609
the Board of Estimate and Apportionment.

From and after those decisions, either or both of which are prior to the writing of the letter which forms the basis of this proceeding, no duty or obligation rested on the Court, as matter of law, to afford to the writer or other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of the various public corporations holding franchises to operate in the streets of New York—neither the 1610
writer, nor the Board, nor the City was a party to the proceedings referred to, the Court having denied intervention and having denied the application for the appointment of a co-receiver, that none of them was entitled as matter of legal right to access to the original sources of information.

Now, there are two points there that I would especialy like to argue to your Honor, because I feel that neither one of them has been distinctly presented, and neither of them has been distinctly passed upon; but both of them may have been passed upon in 1611
effect.

I will briefly state them, not with the desire to argue them, until your Honor has indicated your wish upon the point.

The first of them relates to the point of publication of the writing, other than a publication such as your Honor might possibly hold sprang from the reading of the letter by Commissioner Nixon. At one time during the proceeding, according to the stenog

1612 rapher's minutes, it appears that counsel asked the Court to assume that the proof would be that the Comptroller had not given out the letter for publication, and the Court then suggested in substance that if that appeared, an interesting question would be presented for discussion. The proof of the Government is that the letter was given out in flimsy form by Kerrigan, the secretary to the the Department of Finance; but the proof fails to show any overt act or other act by the Comptroller in support of the giv-
1613 ing out of the letter for publication.

Now, if that is still an open question in your Honor's mind I would like to be heard upon it. If you intended to cover that by your decision upon the demurrer or by any ruling that has taken place during the oral hearing, why no useful purpose would be served by arguing that.

The Court: While I think it would be unnecessary to discuss it now, that point, however, may be discussed in the brief.

The Court denies the defendant's motion
1614 just made.

Mr. Mooney: Now, we except to your Honor's ruling at this time and I make a separate motion here, which I understand was to be reserved, and that is to strike out the testimony of Mr. Kerrigan.

The Court: Motion denied.

Mr. Mooney: I except.

And if I have stated it more broadly than the record shows or indicates, I assume your Honor intends to pass upon the motions that were thus reserved, and it will be as-

sumed that I have re-stated those motions without exactly repeating them? 1615

The Court: Quite right.

Mr. Mooney: And to that I except.

And the other motion I would like to be heard upon has never been presented in exactly the form in which it is now presented, and is, I think, I may say with all modesty, deserving of very grave consideration by the Court; and that is: Whether in the nature of things, any contempt was or could be committed by the writing of this letter after the Court had decided that the city should not be allowed to intervene at this stage and after the Court had decided against the appointment of a co-receiver? 1616

If your Honor will very briefly hear me upon that point I think perhaps it might be well.

Mr. Mooney then argued the motion.

The Court: I understand your argument perfectly. I deny the motion. Counsel may make a memorandum in his brief of this point.

Mr. Mooney: I except.

The Court: To make the record clear I deny the motion to dismiss and deny the same in respect of each and every ground urged in support thereof, and the defendant may have an exception to my denial, to each and every denial. 1617

Mr. Mooney: We except in that way.

It was my intention, your Honor, at this time, as the record shows, to ask that the matter stand over so that we might summarize the proof and proceed with greater

1618

celerity, but I believe that time will be saved on the other hand by our calling some of the witnesses that we have here on hand, and then I shall ask your Honor to bear in mind that we may have at least over night to prepare upon what might be termed the broadest parts of the case.

The Court: Certainly.

1619 JESSE C. BERDEAU, a witness called in behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Mooney:

Q. You are attached to the Clerk's office of the United States District Court, Southern District of New York, in the Court House in the City of New York? A. Yes, sir.

Q. And have been for some years? A. Yes, sir.

Q. And you were serving in that capacity on the 6th day of October, 1919? A. Yes, sir.

1620

Q. I show you an order which has been read in the record and is marked "United States District Court, filed October 6th, 1919, Southern District, New York." Do you know about what hour of the day that order was filed?

Mr. Matthews: I object to that on the ground that it is immaterial.

The Court: Question allowed.

A. I don't know the exact time it was filed.

Q. Did you see it on that day? Do you remember seeing it? A. I did.

1621

Q. And was it then on file? A. At the time I saw it it was.

Q. And at what time of the day was that?

Mr. Matthews: Same objection.
The Court: Question allowed.

A. Between twelve and one o'clock.

Q. Can you state whether it was nearer twelve or nearer one? A. Well, I could not state whether it was nearer twelve or nearer one. It was the lunch hour.

1622

Cross Examination by Mr. Matthews:

Q. What were you doing on October 6th Mr. Berdeau, what part of the work of the Clerk's office did you have in hand? A. Assisting Mr. Leary.

Q. Bill Leary? A. Yes.

Q. He has charge of the criminal papers? A. Yes.

Q. And handles most of the criminal work? A. He handles all of the criminal work.

Q. Now, were you in court on that day? A. No, I was not in court that day, I was in the office entering papers. 1623

Q. In what part of the office? A. In the Clerk's office, room 349.

Q. What time do you usually go to lunch? A. I generally start around twelve to twelve-thirty.

Q. And come back at about what time? A. Half past one.

Q. Do you recall going to lunch on that day? A. Yes.

Q. Did you see this paper before you went to lunch or after you came back? A. It was before

1624

I went to lunch that I saw it. I have a habit of always looking in the order box to see if there was anything which should be entered immediately before I go.

Q. Did you enter this immediately? A. No, I did not. I looked at it to see what it contained, and I did not think it should be entered at that moment, so I went out to lunch.

Q. Did you ever see an order like this before? A. I don't remember whether I ever saw one exactly like that before except that one.

1625 Q. Don't you remember the Order in the case of one Markowitz, similar to this? A. I don't remember that Order.

Q. The Order was in practically the same form. A. No, I don't remember that, exactly like that.

Q. That order was filed, I think, the middle of September. A. I wouldn't say that I remember it, because I haven't any distinct recollection of it.

Q. Have you an independent and distinct recollection of this Order of October 6th? A. Yes.

Q. What brings it to your memory? A. The fact that I have spoken with people two or three

1626 times at the window who wanted to find out what was in it.

Q. You spoke with people at the window about it? A. Within the next few days.

Q. You were not there when the order was filed? A. No, I won't say that I was there or that I was not there. All I know is it was in the order box when I looked at it.

Q. Had it already been stamped? A. It had already been stamped when I saw it.

Q. Did it have any marks on the back? A.

1627

Q. Matter of Charles L. Craig. Was that on it when you first saw it? A. I can't remember whether it had that number on or not.

Q. That is the number indicating that it has been entered? A. No. That is the number showing where it should be entered. On the criminal side there is no mark on the paper showing that it should be entered.

Q. Up to that time you had no docket number for Charles L. Craig? A. No, sir.

Q. So that that number would not have gone there until after it had been entered and a docket space had been assigned to it? A. Yes, not until that docket space had been assigned to it. 1628

Q. Is any time record kept in the Clerk's office of the exact time, the hour, that the papers are filed? A. Not in the criminal part. There is in bankruptcy.

Q. Any other parts? A. I am not sure about any others. I know about bankruptcy.

Q. I think, as a matter of fact, that you are right about that, only in bankruptcy. What is the first entry made of a criminal paper like this, after filing, what was the first entry made of that paper? A. The first entry, so far as that paper is concerned, that would be a brief summary of that paper. 1629

Q. Is there a blotter in the office on which you or Mr. Ferdon enter such papers? A. Yes, Mr. Ferdon has no criminal papers, except on the matter of bail bonds.

Q. Does that blotter indicate the time when papers were filed? A. No.

Q. This would not be on that blotter then? A. No.

1530

Q. Would there be any way in which you could determine what papers were filed just before and what papers were filed just after this? A. None at all.

Q. So you have to rely upon your recollection that it was sometime between twelve and one that you first saw it? A. Yes.

Q. You say you go to lunch between twelve-thirty— A. Between twelve and one, around that neighborhood.

Q. You recall quite distinctly you were not in
1531 court on that day? A. Yes. I was not.

Q. You didn't have to substitute for Mr. Leary or help out in any of the other parts? A. No.

Q. The usual time for the court to adjourn in the mid-day is one to two, in this building? A. Yes, that is the time the court rooms are closed. The men in the office go to lunch whenever they have a chance, that is the way they work.

Q. You can't fix the exact time you went out to lunch that day, or the time you returned? A. No.

Q. It was your impression that you saw this order before you went to lunch? A. It is.

1532 Q. It is possible that it was after you came back from lunch? A. It is possible, yes.

Q. You wouldn't swear positively it was before you went to lunch? A. No, I only say it was at lunch time.

Q. It was at the lunch hour? A. Yes.

Q. And the lunch hour, that is in this building, is from one to two? A. Yes, in the court rooms.

Q. And for the clerks of court? A. Yes.

Q. And, of course, they have to do such work as is necessary between the adjournment and the resuming of the session of the court? A. Yes.

1633

Q. In fact the clerks do not go out immediately when the court adjourns, they have to take care of their papers? A. No, they do not.

Q. In fact they have to chase back pretty quickly to get back at two? A. Yes, sir.

Q. And sometimes you are tied up in the clerk's office so you can't get out promptly? A. Yes, sir.

Q. And it not infrequently happens that you don't get back until sometimes after two when you are not engaged in court? A. We make it a rule to be back within forty-five minutes to an hour, within four or five minutes, not later, how- 1634
ever the time will be dependent on the time when you go out.

Q. So if you go out later your return time is still later? A. Yes.

Q. As a matter of fact on October 6th about the time this order was filed, applications were made at the clerk's office for copies of the order, weren't they, do you recall that? A. They would not come to me for that. They would go to Mr. Ferdon.

Q. That application would be made to Mr. Ferdon? A. Yes.

Q. And if copies were made and furnished, he is 1635
the man to whom would they apply? A. They would have to go to him.

Re-direct Examination by Mr. Mooney:

Q. Do you remember the newspaper men coming around and asking about that order before you went to lunch? A. The newspaper men didn't ask me. They probably went to Mr. Ferdon, because all the newspaper men would go right to him.

1636

CORNELIUS TITUS, a witness called in behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Mooney:

Q. You are attached to the clerk's office of the United States District Court for the Southern District of New York in the Court House in the City of New York, are you? A. I am.

Q. And have been for some years? A. I have.

1637

Q. And you were on duty on October 6th, 1919? A. I was.

Q. In the Clerk's office? A. I don't know whether I was in the office or in Court.

Q. I show you a paper endorsed "United States District Court, filed October 6th, 1919, City of New York," and I ask you whether you saw that order on the day it was filed?

Mr. Mathews: I object to that on the ground that it is immaterial.

A. I did.

1638

Mr. Matthews: And I take the same objection to this line of testimony.

The Court: Yes.

Mr. Matthews: And the motions are made without actually repeating them to strike out the testimony of the last witness, and also this witness.

The Court: Yes.

The Witness: I saw that.

1639

Q. About what time did you see it? A. I can't tell you just what time, but I remember having seen that order.

Q. Can you fix it by any incident or any event when you first saw it? A. The first time?

Q. Yes. A. No, I can't say as to the time. The only incident I can fix is that we didn't know just what number of the criminal docket to put in.

Q. Now, whom do you refer to as "we?" A. Mr. Leary.

Q. Did you have any talk with the last witness on the subject at that time? A. At that time.

1640

Q. At that time? A. Yes. I may have. I can't say whether I did or I did not.

Q. Are you the man to whom the order was handed to be filed? A. No.

Q. And your attention was first drawn to the order by the fact of the newspaper men wanting to see it or get a copy of it? A. No.

Q. Well, what did first draw your attention to it aside from the fact that you wanted to know or someone wanted to know where it was to be entered? A. Well, we generally try to keep track of what is going on in the criminal department. We have a box there on the desk which we look through.

1641

Q. Well, do you have a recollection of an incident or of an act, or a fact which calls your mind back to the filing of that order? A. No.

Q. Did you see it handed through the filing window? A. No, I didn't.

Q. And where was it when you first saw it? A. The first time I saw it it was in the tin box on Mr. Leary's desk.

Q. The fact that it has no hour of filing upon it,

1642

is that a usual or unusual thing with matters relating to criminal proceedings? A. That is usual.

Mr. Mooney: That is all.
Mr. Matthews: No questions.

By Mr. Mooney:

Q. Did you see the paper, if you can recall, before or after you went to luncheon on that day, if you did go to luncheon? A. That I cannot say.

1643

JAY McNAMARA, a witness called in behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Mooney:

Q. Mr. McNamara, you are a shorthand writer by profession? A. Yes.

Q. And were you on the 6th day of October, 1919, acting as shorthand reporter under the name of the General Shorthand Reporting Company,

1644 having an office at 150 Nassau Street, in reporting the proceedings of the Public Service Commission of the State of New York, First District? A. Yes.

Q. And did you on that day work under a contract dated on or about May 31st, 1917? A. Yes.

Q. In that connection? A. Yes.

Q. And have you the contract with you? A. No.

Q. Will you state whether in reporting these proceedings of the Commission you have an arrangement whereby the Commission is entitled to be credited against the charge to the Commission a certain percentage for each transcript sold?

1645

Mr. Matthews: I object to that as immaterial.

The Court: I don't see the materiality, but I will allow you to show the percentage.

Mr. Matthews: I think if there is a contract, a written contract, that contract should be produced.

The Court: I will allow it in order to expedite the trial.

The Witness: The contract reads that I shall credit against the charge to the Commission a certain percentage on all copies 1646 sold.

Q. As a matter of fact you were subpoenaed to produce the contract itself, were you not? A. I did not interpret it so in reading it.

The Court: I am willing to take Mr. McNamara's statement.

Mr. Mooney: If that is so, I am satisfied.

Q. You did go out to sell copies of the report of the conference that was held on that day, namely, October 6th, 1919? A. I did get out copies, 1647 and copies were sold.

Q. There was a large demand for the copies, were there not? A. I should say not a large demand, probably from individual sources.

Q. I didn't ask you that. There was a large demand?

Mr. Matthews: I object to the question as leading. The witness has answered properly.

The Court: What was the demand?

1648

Q. What was the demand? You had to reprint even, didn't you?

Objected to as immaterial. Overruled.

Q. How large a reprint? A. I reprinted, probably through the misapprehension of the Commission in not ordering the correct number originally. Under the contract, in other words—I furnish a certain number of copies—they didn't know how many copies they wanted, the matter was held up,
1649 and I went ahead and printed them. The reprint was called for while it was still on the press, I think, the first reprint.

Q. What was the original printing? A. Fifteen copies was the original printing for the Public Service Commission.

Q. Then you got out copies for practically everyone named as being at the conference, didn't you? A. No, that is not true. I did get out copies for probably eight or ten different parties present at the conference that day.

Q. And then after that you reprinted again,
1650 didn't you? A. As I recall it there were two reprints. One took place probably three or four weeks later than the original hearing.

Q. Well, it is very unusual to reprint at all your proceedings, isn't it?

Mr. Matthews: I object to that as immaterial and leading.

Question allowed.

A. It would not be unusual in this case, inasmuch as the Commission did not determine immediately how many copies. I should have waited

1651

for them to decide before I had the printer run off the copies.

Mr. Mooney: That is all.

Cross Examination by Mr. Matthews:

Q. How long have you been employed by the Public Service Commission to do that reporting? A. Three years.

Q. And the same form of contract has been in existence during substantially all that time, has it not? A. Substantially the same form of contract. 1652

Q. And in reporting the particular proceeding of October 6th, you had Mr. Joseph Friel actually do the work of reporting? A. He did the physical reporting, Mr. Friel.

Q. And he was the only man you had there that day? A. Yes.

Q. You were yourself there? A. I was there during the entire hearing.

Q. But he did the actual reporting? A. He did the actual reporting.

Q. Now, part of that hearing was closed, was it not? Do you recall when the newspaper men were 1653 excused from the room? A. I recall the remarks of Commissioner Nixon that it would be a closed hearing, but whether that actually went into effect, whether it was followed out, I am a little uncertain at the moment. My impression is that it was.

Q. Then it is true that you did not sell any of the copies of the proceeding until there was a release order by the Public Service Commission?

Mr. Mooney: I object to the words "release order," because—

The Court: Objection sustained.

1654 Q. Until the Public Service Commission informed you that it was all right to go ahead and sell copies?

Mr. Mooney: I object to any further questions about that. If there is any question about that I want this gentleman's contract. There was no question as to whether the Public Service Commission should release or not. He had a contract.

The Court: Objection sustained.

1655 Q. What was your practice in reporting, after you had a public hearing at which the newspaper men were present, you went ahead and sold copies as soon as you had it out? A. If it was a public hearing and I had not been instructed not to sell I would follow the ordinary procedure, get the copies typewritten, or printed, as the case might be, and deliver the copies to the Public Service and to whoever ordered copies within the course of a day or so.

Q. How soon after October 6th, did you deliver the first copies to the Public Service Commission in
1656 this case? A. As I recall it in this particular case, between ten and eleven o'clock a rough typewritten draft of the proceedings of the day before; that was merely in revised form for the printer. That was taken up to the Commissioner, to be left, instead of the printed copies, inasmuch as I could not get the printed copies out that night, I brought it and left it with the Commissioner. Then later brought over another copy to the printer and had him run off the specified number of copies desired.

Q. So that the delivery of the printed copies didn't take place until the 8th of October, or after? A. My recollection is this was Monday, the 6th,

and about fifty copies were delivered to me late Wednesday afternoon, I recollect getting them here. 1657

By the Court:

Q. That was Wednesday? A. That was Wednesday.

Q. The 8th? A. The 8th.

By Mr. Matthews:

Q. It was on Wednesday afternoon or Thursday morning that the first printed copies were delivered? A. On Wednesday afternoon or Thursday morning as I recall at present, the first printed copies were delivered to the Commissioner. 1658

Q. Now, what is your practice when you report closed sessions of the Commission with respect to selling copies? A. I recall in the three years we only had three instances where we had closed hearings, and in those cases I had instructions not to sell copies to anybody outside.

Q. I understand from your testimony that you delivered only one copy on the morning of the 7th, am I right? A. I delivered only one copy on the morning of the 7th, one rough typewritten copy. 1659

Q. You didn't sell any typewritten copies at all of these proceedings? A. No, there were no typewritten copies sent out.

Q. And the first printed copies that were available were not fully completed until when, Wednesday afternoon or Thursday morning? A. Until late Wednesday afternoon or early Thursday morning.

Q. Now, can you recall the date on which you sold the first copy of the proceedings, the first sale by

1660 you? Did you sell any Wednesday? A. You mean to anyone outside of the Commission?

Q. Yes. A. The first sale likely occurred on Wednesday, but it did not go out until Thursday. It was put in the mail that night and delivered by the mail Thursday morning.

Q. Did you sell some copies Thursday? A. No, I delivered—

Q. No, I mean sell them as distinguished from delivering them to the Commission under your contract? A. Those are practically all standing orders.

1661 In other words, the order had been standing with the different railroads, when they have a hearing they order a copy.

By the Court:

Q. The question is outside of what you delivered to the Public Service Commission, when did the first copies go to some other person? A. I answered it—that it was either late Wednesday afternoon, possibly mailed Wednesday night and they reached the parties early Thursday morning.

1662 Q. That is those went to— A. Those that went to the different railroad companies—

Q. —who have standing orders with you for copies of the proceedings? A. That is correct.

Mr. Matthews: That is all.

Re-direct Examination by Mr. Mooney:

Q. Those standing orders, did they call for, and did you deliver in pursuance thereof, copies of these proceedings to the counsel representing the railroads interested in the conference? A. In other words, the B. R. T. or the Interborough might have

a standing order for two copies. Unless advised to the contrary, which I was not in this case, I brought them over or delivered two copies to the different parties. 1663

Q. That is what you did in this instance, mailed two copies, or sent two copies, to each person attending the conference representing a railroad? A. No, that is not correct.

By the Court:

Q. To each of the parties having an order? A. I sent whatever the order called for, one or two or three copies, whatever the order called for. 1664

Q. In any event you sent whatever the order called for? A. I sent one to some, two to some, and more to others.

By Mr. Mooney:

Q. You observed the same course with respect to these minutes you did with reference to all other minutes? A. With the exception that there was a stop order on it. In other words, I was not to release this until a certain day. Then I followed the same procedure after I got instructions, which was— 1665

Q. What was the stop order for? A. In other words it was stated that the hearing was closed, and I had instructions not to give newspapers or anybody else any data or information regarding the conference.

Q. Now, when was that stop order taken off, that afternoon? A. As I recall it it was the next morning that I got absolute information to release the copies, after I brought that rough draft,

1666 although on the afternoon of the day of the hearing, as I remember it, someone said, although I don't recall who it was, that I could release the copies, that it was all right to go ahead.

Q. I show you a paper that is produced by another witness, not present in court, from the commission, as an original paper from the files, and ask you whether the entries therein are in your handwriting, referring to the second entry therein? A. No.

Q. In whose handwriting is that? A. I do not know.

1667 Q. Is that Mr. Friel's handwriting? A. I could not answer positively.

Q. Do you recognize the sheet as one of the official time sheets of the commission? A. I recognize it.

Q. And do you recognize any marks of authenticity therein emanating from you or anyone in your employ? A. Yes, I recognize that this is the form that we fill in, the time sheet, when the hearing is over we make up one of these time sheets, and this is a regular time sheet we would have made out. I don't recognize any of the entries on it, I mean

1668 the handwriting of any of the entries.

Q. Do you know whose the initials "H. L." are? A. The initials?

Q. Yes. A. I don't recall at the moment who those initials represent.

By Mr. Matthews:

Q. You get the official time, do you not, and enter it up in the transcript which you take of hearings? A. It appears in the transcript, the time we start and also the time the hearing is adjourned.

Q. That is done in the usual and ordinary course

of business, and that time is correct? A. I won't say it is absolutely correct. It is approximately. In other words it might be twenty minutes to ten and it might appear quarter to ten. It is approximately correct. 1569

HARRY B. MINTZ, a witness, called in behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Mooney: 1570

Q. I show you a paper and ask you where that is produced from? A. That is a time sheet that is first left in the drawer of the reporter's desk. At the end of each hearing the reporter enters on here the nature of the hearing, the time commenced, which he takes from his own notes, the Commissioners present, the time adjourned and the adjourned date. This then comes down to my files where it is kept among the other time sheets.

Q. What is your legal relation to the Commission? A. I am Junior Assistant Counsel in charge of cases and orders and calendars. 1571

Q. And is this record kept for purposes of exactness in the Commission? A. It is.

Q. And after you have received it in the way you have spoken of, to whom does it go, or by whom is it passed upon in addition to yourself? A. That remains in my office.

Q. Whose initials do you find opposite the second entry? A. That is one of my assistants, Helen Leventhall.

Q. And do the names entered there indicate as

1672 well as the Commissioner, the members of the staff and other persons who were present at the hearing? A. Yes, who sat on the bench at the hearing, and The Transit Construction Commission.

By the Court:

Q. The names are, Nixon, Delaney, the Construction Commissioner? A. Yes, there—

Q. And Ryan is the Deputy Construction Commissioner? A. That is right.

1673 Q. And Glennon and Barrett were attached to the Public Service Commission and others were attached to The Transit Construction Commission? A. Yes, that is right.

By Mr. Mooney:

Q. When you spoke of the reporter, you meant the shorthand reporter, did you? A. Yes.

Q. What is there in that paper, or your knowledge connected with this paper, to indicate its correctness as to the time and substance? A. This paper?

1674 Q. Yes. A. After it comes to my office, if I am up in the hearing room, I bring this time sheet down to Miss Leventhall and she enters it in what we call a docket or a hearing book. That is also checked off against the minutes, printed or typewritten when they come in, that is as to the date adjourned, the time commenced and the time adjourned.

By the Court:

Q. Were you present at this hearing? A. Part of the hearing. I didn't remain throughout it.

1675

Q. What time did you leave? A. I left early in the hearing.

Q. In whose handwriting is the entry which appears on the right hand column, the second entry? A. The time sheets are always in the handwriting of the reporter.

Q. That is the shorthand writer? A. The shorthand writer.

By Mr. Mooney:

1676

Q. Do you recognize the handwriting of the shorthand reporter on that sheet? A. I thought it was Mr. McNamara's, until I heard his testimony to the contrary.

Q. But now, having heard his testimony, and having our minds centered upon the writing, does it enable you to indicate by any other means than guess whose handwriting it is? A. I could not say. If it is not Mr. McNamara's handwriting it is one of his assistants.

1677

Q. Any way this is an official record kept in the regular course of business by the Public Service Commission and produced by you subject to the subpoena duces tecum from the files of the Commission? A. Yes.

Q. I understand from what you stated before you were on the stand that it is your wish or the wish of the Commission that the paper be not marked and be returned to your files? A. Yes, it being an official record, I supplied your office with a copy of the record.

Mr. Mooney: The paper reads: On the left hand side "Case No. Conference, time commenced 10:40 A. M." and under-

1678 neath that "Adjourned to October 15th, 10:30 A. M."

At the top "October 6th, 1919,"—on the right hand side is the word "Commissioner," on the line with that is "Nixon, Delaney, Glennon, Barrett and Ryan." Then the words "Time adjourned 12 M."

Received as Defendant's Exhibit E.

Q. Have you produced pursuant to subpoena
1679 duces tecum certain communications addressed to the Public Service Commission? A. With the exception of No. 3, which I have not been able to locate in the short time I have had to make the search for it.

Mr. Mooney: I offer in evidence these communications.

Q. These are produced from the official files of the Public Service Commission pursuant to subpoena duces tecum? A. Yes, and are part of the
1680 records of the Commission which should only be marked by reference.

Mr. Matthews: If they are received at all there is no objection to having them read into the record or copies substituted.

Q. Will you furnish us copies? A. We will have copies made.

Mr. Matthews: I would like to examine it before they are received into the record. I object to the letters on the ground that they are irrelevant and immaterial.

1681

The Court: I don't see the materiality or relevance of these papers, Mr. Mooney.

Mr. Mooney: Is that intended as a ruling, your Honor, or is it intended as a request for an indication on my part as to the respect in which they are relevant?

The Court: The latter.

Mr. Mooney: In the first place, they relate to the question of the conference, and while they are remote in date, they bear upon the general features and the surroundings of the conference at which the letter 1682 was read.

The Court: Objection sustained. I think they are immaterial and irrelevant. I don't think they at all indicate anything in reference to the conference. You may mark them for identification.

Mr. Mooney: We except. Mark the copies in order that the originals may be returned to the files of the Public Service Commission.

Col. Caffey suggests that we just give the dates so we may identify them. 1683

The first one is a communication from Lindley M. Garrison to the Public Service Commission, dated January 3rd, 1919.

Marked for identification Defendant's Exhibit F.

Mr. Mooney: And the carbon copy is one addressed to Lindley M. Garrison and signed "James B. Walker, Secretary of the Commission, dated January 6th, 1919."

Marked "Defendant's Exhibit G for Iden tification."

1684

Mr. Mooney: The next is a communication written by Lindley M. Garrison, Receiver, addressed to James B. Walker, Secretary of the Public Service Commission, dated January 9th, 1919.

Marked Defendant's Exhibit H for identification.

By the Court:

Q. Now, during your service in the Public Service
1685 Commission, do you recall any meeting where there was a public hearing and then at some point the public hearing was closed and some private—I won't say private—but some hearing had not in public, some conference? I don't want to know the details, I just want to know whether you recall an occasion of that kind? A. Yes, I have known many instances where after public hearings conferences were had after the hearings were closed or adjourned.

Q. Can you state, if you know, what the character of the business was in regard to such in-
1686 stances? A. Informal conferences as a rule, I should say, there is no record kept of.

Q. Is there a record kept of the time when these conferences began or ended? A. No. There is no record, for the reason that there is no stenographer, taking these conferences,—simply a meeting for the purpose of suggesting ways and means to carry out a certain line of action.

Q. Now, it has been testified in this case that there was a public hearing, at a certain point the newspaper people were excluded and that the other people present then continued with certain sub-

1687

ject matters. Now, is there any regular course of business in such an instance as to the time being entered upon this slip that you have produced? A. The hearing before the Commission with respect to the conference was had at the time stated in the minutes. I heard no direction excluding reporters. I myself heard no such direction.

By the Court:

Q. Then you don't know what happened? A. I do not.

1688

NAT ELGOVSTEIN, a witness called in behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Mooney:

Q. Are you attached to the Transit Construction Commission? A. Yes, sir.

Q. In what capacity? A. Clerk.

Q. Have you, pursuant to subpoena duces tecum 1689
served upon that Commission, produced certain papers from its files? A. Yes, sir.

Q. Will you please let me see those referred to in the subpoena?

(Witness hands papers to Mr. Mooney.)

Mr. Mooney: I offer in evidence these papers.

Mr. Matthews: I object to this one on the ground that it is irrelevant and immaterial.

1690

"Movement numbered 8, docket numbered 7344."

The Court: Objection sustained. Mark your paper for identification.

Mr. Mooney: Your Honor understands the direction to which the paper is addressed?

The Court: Certainly I do.

Mr. Mooney: And it is not sustained because of the question of identification of signature or the filing of papers or anything

1691 of that kind?

The Court: Not at all. It is sustained on the merits as inadmissable testimony on materiality, on the merits.

Mr. Mooney: This should be marked for identification and the Court will observe that it consists of five pages and a pink extra slip and that copies may be substituted in the place thereof.

The Court: Certainly.

Mr. Mooney: In fact I presume that if the originals are returned—

1692 The Court: That copies will be furnished for the use of the Court.

The Witness: Yes.

Marked "Defendant's Exhibit I for Identification."

Mr. Mooney: I offer this second paper. This paper is produced also from the files of the Commission, which is now handed to you. This paper is a pink slip. Docket No. 7344, movement number 3, and in addition to the pink slip consists of 15 typewritten pages.

1693

Q. Now, Mr. Elgovstein, you will do the same as to this, the original being returned to you will you see that copies are furnished to the court? A. Yes, sir.

Mr. Mathews: I object to that as irrelevant and immaterial.

The Court: And the paper is marked for identification.

Mr. Mooney: This is excluded upon the same ground, and there is no point made that this paper or that paper should in chronology or in sequence have been offered first. 1694

The Court: No point is made as to that. It is excluded on the same grounds as before stated.

Mr. Mooney: I except.

Papers marked, "Defendant's Exhibits I and J for Identification."

Mr. Matthews: You offer them only Exhibits I and J?

Mr. Mooney: Yes.

1695

WILLIAM W. DRASTELL, a witsess called in behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Mooney:

Q. You are a clerk connected with the office of the Clerk of the Court of General Sessions of the Peace of the County of New York, are you? A. I am.

1696

Q. And have you pursuant to subpoena duces tecum produced certain minutes of the Grand Jury? A. I have, sir.

Q. And are these minutes just produced by you, are they public records under and pursuant to an Order made by the Court constituting them public records? A. They are, sir.

Q. In other words, as distinguished from private minutes or minutes that are not to be published. Now, these minutes of the Grand Jury, in this instance, by special order of the Court, were made

1697 public?

Mr. Matthews: I object to that upon the ground that it is immaterial and irrelevant. On the ground that if there was any Court order the Court order should be proved.

Mr. Mooney: That, of course, would only make a second trip, if you should press that point.

The Court: I will take a statement in place of the Order.

1698 Q. These are severally indicated by the numbers upon their face, are they: 2160 constituting one volume— A. I don't know the volumes.

Q. And the other is 2024? A. Yes.

Q. One of these which is numbered as 2024 is not in a bound volume and is not endorsed with an endorsement on the back? A. Yes.

Q. The date appearing on the first page of the volume is January 24, 1908, isn't it? A. Yes, sir.

Q. And the second volume, 2024, is a binder and commences with page 5681, March 20th, 1908, is that correct? A. Yes, sir.

Q. Now, these two volumes are inscribed "Grand

1699

Jury Minutes 1908, Street Railway Investigation," are they? A. They are.

Q. And the volume, 2160, is inscribed "People of the State of New York vs. John Doe and Others, Metropolitan Street Railway," and the first thing therein is on November 13th, 1907, et seq. Is that correct? A. Yes, sir.

Mr. Mooney: I think these are sufficiently identified for our purposes. I don't know of any other means of identification in regard to these minutes. Have you any suggestion to make? I ask that they be given a number.

1700

Mr. Matthews: For identification.

Mr. Mooney: I would like to have that one, 2024, marked for identification.

Marked "Defendant's Exhibit K for Identification."

Mr. Mooney: The second volume should be marked with the next alphabetical designation, which should be L.

Marked, "Defendant's Exhibit L for Identification."

1701

Mr. Mooney: The volume 2160 with the next alphabetical designation, which should be M.

Marked, "Defendant's Exhibit M for Identification."

Mr. Mooney: My associate calls my attention to the fact that the numbers are not a clear indication of the chronology. This is to prevent confusion.

Mr. Matthews: I have no knowledge of the purpose of having these marked. By no thing that I have stated do I intend in

1702 any way to indicate that the Government waives any objection it might have to the receipt of these documents.

The Court: I will let them be marked for identification. Do you offer them?

Mr. Mooney: What I have in mind is something more useful than that, a compendium has been made of those matters which are material to this controversy and the intention is to offer that compendium and just have the compendium rest upon the basis of these Grand Jury minutes.

1703 The Court: For the purpose of expedition I am satisfied that the compendium be offered.

Mr. Matthews: If the Court please, when the conpendium is offered I shall want in the record the basis upon which the conpendium rests, as Mr. Mooney says.

Mr. Mooney: I think that will all come up in regular order.

The Court: Here convened to meet at 10:30, June 9th, 1920.

1704 ———

New York, June 9th, 1920.
10:30 A. M.

Met pursuant to adjournment.

Present—SAME COUNSEL as before.

Mr. Mooney: I will offer for identification the official publication of the investigation of the Interborough Metropolitan Company and the Brooklyn Rapid Transit

Company under Section 45 and 48 of the Public Service law, pursuant to special resolution of the Public Service Commission for the First District, adopted in session held at 320 Broadway, City of New York, on Thursday, July 18th, 1907, published by the official authority and consisting of six volumes, now produced. For the purposes of convenience, this investigation is commonly known as the Ivins Investigation. 1705

Mr. Matthews: You ask to have those marked for identification

Mr. Mooney: The six volumes as one exhibit. 1706

Marked "For Identification, Defendant's Exhibit N."

Mr. Mooney: I offer for identification four volumes known as 3-4-5 and 6, of minutes and testimony of the Joint Legislative Committee appointed to investigate the Public Service Commission, authorized by Joint Resolution of January 21st, 1915, and continued by Joint Resolution of April 24th, 1915, and further continued by Joint Resolution of January 20th, 1916, and March 6th, 1916, transmitted to the Legislature March 30th, 1916, published by authority. This investigation is commonly known as the Thompson Investigation. 1707

Volumes 1 and 2 are not offered, for the reason that they contain the report, and my present offer is only concerned with the testimony and documents which are contained in these four volumes. I ask that these four volumes be marked as one exhibit.

1708 Marked "For identification, Defendant's Exhibit Q."

Mr. Matthews: I do not want it to be understood in any sense that I am accepting Mr. Mooney's statement that these are official, are published by official authority, or to waive any right to object to the introduction in evidence of any of the exhibits being marked for identification, on any ground whatsoever. I shall object. I am fairly certain now that these documents that are being marked, are not only irrelevant and
1709 immaterial, but are also absolutely incompetent.

Mr. Mooney: On the question of incompetency, your Honor, I hope my learned friend is not going to press that, because that would require very considerable testimony. We would use two or three days, probably, going through all of those steps which would assure me, in the same way that he would want to be assured, of the different bases upon which the report might rest. I shall accept the challenge, if he in-
1710 sists upon that.

The Court: I am desirous of expediting the proceeding. In that matter I shall overrule the objection so far as it concerns the competency.

Mr. Caffey: Not only competency. Hearsay and irrelevancy.

The Court: So far as that is concerned I shall take these books as if they were the originals—

Mr. Caffey: As if they were genuine originals?

The Court: Oh, yes.

Mr. Caffey: There is a difference between originals and competency. They are absolutely incompetent whether they are genuine originals or not. 1711

The Court: That clarifies the objection Mr. Matthews made. That is perfectly all right. I assume that was the point which you had in mind when the question of competency was raised.

Mr. Caffey: Absolutely.

Mr. Matthews: That is the point I had in mind. I didnt want it to be understood, because those books are official, that the hearsay rule would not apply to them, the same as to any other writing. 1712

The Court: Of course, I thought an objection was made to the character of the reports.

Mr. Caffey: No, not at all. They are the rankest hearsay.

The Court: There is no question as to the genuineness of the documents, that they are true copies of the proceedings. I understand the point as to incompetency is directed to the proposition that the subject matter is hearsay. 1713

Mr. Mooney: As to that, your Honor, it might be advisable for me to say a word. Because, we have proceeded upon a condensation of the testimony which is to be offered here, and we have condensed it to the last degree.

My learned friend—Of course this will not come up ultimately until the offer is made, but as the Comptroller is detained for a few minutes on absolutely imperative public business, while we are awaiting him,

1714 if your Honor will consider the discussion appropriate now, it might be advisable to deal with that:

A public investigation conducted under the authority of the Legislature of the State of New York is not in any sense hearsay. It is a matter of public knowledge, in the same way that certain facts are taken into judicial knowledge of a different class and character. The mere fact and circumstance that a proceeding is conducted under the authority of the legislature is for the pur-

1715 pose of informing the public with respect to the matters inquired of; and it is in that connection, that we propose to lay the foundation for the knowledge possessed by the Comptroller, first as one of the public and secondly in his official capacity, by reason of the investigations thus authorized and empowered by the State of New York.

To say that a proceeding is hearsay, when the very purpose of conducting it is to inform the public so that the public may know these facts and act upon the information that is obtained, is a very contradiction in

1716 terms.

There is a second aspect, with reference to this matter, that I would like to impress upon the attention of the Court, which applies to this class of evidence as well as to others and should, in our view, very much broaden the scope while justifying the condensation, and it is this: This proceeding is, in its nature, and by its description, a summary proceeding, and there is applicable to it different rules of evidence than those which exists and persist in common

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law courts. The intention being that the matter is to be summarily inquired into and that the best evidence which is reasonably available shall be produced in the proceeding.

I need not dilate upon the last proposition at this time, but it is one which is very likely to be lost sight of if it is not impressed upon the attention of the Court.

There is no question, I think, after reading the authorities, but that in this kind of an inquiry the evidence is not to be weighed 1718
according to those tests which are applicable in ordinary forums.

I have expressed myself now so that your Honor will have my views before you when you come to rule upon the testimony when it is offered.

CHARLES L. CRAIG, the defendant, called in his own behalf, being duly sworn, testifies as follows:

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Direct Examination by Mr. Mooney:

Q. You are the Comptroller of the City of New York? A. I am.

Q. And when were you elected to office? A. In the fall of 1917, November, 1917, for a term of four years, beginning January 1st, 1918.

Q. And you qualified and entered upon the discharge of your duties as such, and have been discharging your duties since that date up to the present? A. Yes.

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Q. Are you, as Comptroller, and by virtue of your office as such, a member of the Board of Estimate and Apportionment of the City of New York? A. Yes.

Q. And are your powers and duties as Comptroller set forth in the Charter of the City of New York? A. Well, not entirely. They are partly in the the Charter and partly in various Statutes that supplement the Charter, in general.

Q. And is the same thing true with respect to the powers and duties of the Board of Estimate
1721 and Apportionment of the City of New York? A. To a lessor degree.

Mr. Mooney: I rather assume that it will be convenient for the use of the Court that a compendium of the sections of the Charter be presented and marked as part of the record. The Court will take notice of the Charter as it is a general act of the State of New York, and I submit that it need not be completed at any specified date, as it is nothing more than a compilation. Is that agreeable?

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Mr. Caffey: The Court can take judicial notice.

Mr. Mooney: We have a very large record already, it would be very much better to have this in the form of a compendium than in the form of a brief. It will load the brief.

The Court: I am entirely agreeable, Mr. Mooney, do you mean to include in that general and special statutes outside the charter, directly relating to the duties and powers of the Comptroller of the City of New York?

Mr. Mooney: In a general way, yes, sir.

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Q. There are general statutes outside the Charter directly relating to the duties and powers of the Comptroller and the Board of Estimate and Apportionment of the City of New York? A. Yes.

Q. You are a member of the Bar, Mr. Craig, are you? A. I am.

Q. And you are a member of the Bar of this Court, are you? A. Yes.

Q. When were you admitted first as a member of the Bar? A. Sometime in 1903.

Q. That is in the State Court? A. Yes.

Q. Were you a graduate of any school or university? A. Columbia University, School of Law. 1724

Q. And were you in active practice in the City of New York up to the time you became Comptroller of the City of New York? A. I was.

Q. In what connection, with whom? A. Well, I practiced alone. For a number of years I was associated with Hoadly, Lauterbach & Johnson, and handled practically all their important trial work and more complicated litigations; and after sometime in 1913, or the early part of 1914, James A. Foley, who is the present Surrogate, and myself, had offices together at 66 Broadway. There was not a partnership. There were many things in which 1725 we were interested and many things of his in which I had no interest and many things of mine in which he had no interest. I don't know how that answers your question. My practice at the Bar covered practically every field except admiralty.

Q. And did you have a practice in everything excepting admiralty? A. I got into patent litigation now and then, but in that I usually had help.

Q. Did your practice include a substantial amount of receiverships? A. Yes.

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Q. Did you acquire therein knowledge and experience with respect to the development of facts from original sources? A. Yes.

Q. And was the result of your experience with respect to receiverships that any workable knowledge could be acquired execept from original sources?

Mr. Caffey: I object to that.

The Court: Objection sustained.

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Q. Well, will you state what knowledge and experience you acquired as a member of the Bar with respect to the ascertainment of facts in receivership matters and from what sources such facts could be obtained?

Mr. Caffey: Objected to as incompetent and irrelevant.

The Court: Objection sustained.

Mr. Mooney: I except.

I am not going to press these questions, your Honor. The Government can take the responsibility of its course. I had rather as-

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sumed that a contempt proceeding was for the purpose of arriving at the knowledge, the understanding and the position of the defendant who is charged with the act at the time he committed it. But, apparently, my learned friends are actuated by the thought that the way to try a contempt proceeding is to exclude as much of the proof outside of the letter as possible. They must take that responsibility. I am not going to struggle beyond the requirements of my position.

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Q. Did the City of New York have an interest in the matter of the Traction Companies? A. It has a very large financial interest, and, of course, has a very large public interest.

Q. We will take those in their several aspects: Will you state, in general, the figures of the financial interest of the City of New York, the direct financial interest? A. The city's investment in the so-called rapid transit lines at the present time is represented by appropriations that have been authorized to the extent of a little less than $300,000,000, of which actual expenditures have been made of something around $285,000,000. I can supply the exact figures to any given date that is required. Besides that the City is committed to the building of certain rapid transit lines: Specifically what are known as Contracts 3 and 4. Number 3 being with the Interborough Rapid Transit Company, and number 4 being with the New York Municipal Railways, called the Brooklyn, the B. R. T. Those two being known as the Dual Subway Contracts. The unfinished routes, that is the parts for which no appropriation has been yet made, for which no contracts for construction have yet been awarded, as nearly as it can be estimated, at present, entail an obligation upon the City of upwards of $75,000,000, for their completion.

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Q. And these figures that you are now giving me, in round numbers, which is all that we require for the present purpose, are substantially as they existed on October 6th, 1919, are they? A. Well, there has been no change in the gross liabilities. There has only been a shift from those things for which no appropriation has been made to those for

1732 which appropriations have been made and expenditures actually incurred.

The $75,000,000 I mentioned has to be added to that figure of about $300,000.000. About $375,000,000 is the extent of the City's interest in the enterprise, as represented by actual outlay, by appropriation and by provisions in the contracts themselves, yet to be carried into effect.

Q. Now, do these vast sums— A. Besides that, the City has an interest in other forms of transportation, such as surface lines and bridge lines—

1733 Q. Illustrate, please, the last statement of yours for ordinary comprehension, by reference to the particular sections. A. Well, an illustration of the surface lines would be the line through Central Park at 86th Street, which is owned by the City of New York, built by the City of New York, and the lines over the Williamsburg Bridge and the lines on the 59th Street Bridge the tracks and terminals of which are the property of the City of New York.

Q. And those are intimately related with the rest of the traction system of the City of New York?

1734 A. Yes.

Q. Now this vast sum which you have mentioned, has it a direct relation to the debt limit of the City of New York under the Constitution of the State of New York? A. Well, it has so direct a relation to it that every appropriation for rapid transit, subway construction, or other rapid transit construction must be provided for by the issue of public stock, every dollar of which is a charge against the debt incurring power of the City, or the so-called debt limit.

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Q. So that the success or the non-success, or the value, or the non-value of the Rapid Transit System in the City of New York has a direct effect upon the financial activities of the City of New York in other directions, has it, by reason of the debt limit provision of the Constitution? A. Yes, at all times.

Q. Will you describe, briefly, the other interests which the City has in the question of rapid transit? A. Well, I suppose by that you mean the public questions which were involved and which led to the authorization of these various railroad lines. 1736 Now, in its origin, one of the questions there, one of the chief questions was the congestion of population on the Island of Manhattan, and the paucity of transportation facilities to other Boroughs, which would together form the whole city of Greater New York. There was the question of providing some method of scattering that population so as to relieve the congestion in Manhattan and at the same time to provide transportation to the other parts of the City where the population is apt to go and to thus provide for the development on the other parts of the City. Those are the 1737 main consideration which lead to the whole rapid transit enterprise. In connection with that, the question of fares was intimately connected from the beginning to the end. All kinds of propositions were discussed, as for example, the system of zoning fares, where a small fare was to be charged for shorter hauls and graduated or increased fare for the longer hauls. For example, a five cent fare in the Borough of Manhattan, and five cents to some point to be arbitrarily fixed in Brooklyn,

1738 the Bronx and Queens and an additional fare to some other and more distant location.

The difficulty with that, as developed in the discussion of this subject, was the natural human tendency to avail itself of the five cent fare, and to defeat the very purpose of scattering the population congested on Manhattan Island. Because the attractiveness of the five-cent fare as against an increased fare, which had to be provided for the more distant points if the zoning system was authorized would tend to keep the population with-
1739 in the five-cent zone, and prevent its being extended to those parts of the City where there was ample room for habitation and which, at that time, has not been developed. It was principles of that kind and discussions of that character, over a period of, not only of months but of years, that resulted in the determination that the only policy that the City could safely and securely and permanently embark upon was one that fixed the rate of fare, and fixed a rate of fare which was expressly agreed upon, and one which should not in any event exceed five cents. And it was in connection with that
1740 general view of the facts that the routes, the so-called Dual Subway System were laid out, so as to reach all of the undeveloped parts of the other Boroughs, and the City practically divided between the two companies. That is, while it is referred to as the Dual System, there is only one system. There is no duality about it. It is the Brooklyn Rapid Transit and the Interborough Rapid Transit, the lines of which constitute the rapid transit system. There are three great main lines in the Bronx. There are two lines now in Queens, and there are a great number of them in

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Brooklyn. Of course, there have been a great number of main trunk lines added in Manhattan. I don't know whether you are interested in my specifying those lines or not. It would be a very simple matter to do it, if you want me to go into it.

Q. I think that appears from the evidence already introduced by the Government, but I will ask you whether there are provisions for the purpose of presenting a bird's eye view of the matter—whether there are provisions in the contracts between the rapid transit lines, or some of them, and 1742
the City of New York, whereby the contract rights are established between the railway companies and the City, which the Board of Estimate and Apportionment claims the right to enforce and control as the legislative branch of the City of New York?

Mr. Caffey: I object to that as incompetent.

The Court: I don't see the point

Mr. Caffey: It is irrelevant as well.

The Court: The question asked the witness is merely whether that is claimed. Under the circumstances I will allow the 1743
question.

A. Will you please read the question?

Q. (Question read.) A. Yes, with qualifications.

Q. Yes. I am not attempting by my question to cover the whole subject. And I assume that you are not attempting by your answer to cover the whole subject? A. Whether the Board of Estimate claims it is the legislative branch or otherwise is a question. I didn't want to go beyond the ruling and volunteer an answer which appears to be more

1744 than yes or no. I can explain more fully, if you wish me to do so.

Q. I wish you would, briefly.

Mr. Caffey: I object to that as utterly irrelevant, as well as incompetent.

The Court: I have no desire to shut you off, but I don't see what is the point.

Mr. Mooney: The point is, your Honor, the standpoint from which the defendant wrote his letter. A man cannot just sit
1745 down and write a letter if he has no surroundings or bearings from which to write it. If the man was in fact in the green grocery business and sat down and wrote a letter to the President of the United States on a scientific subject it would be quite ridiculous, and it would be very likely to receive the scorn and humor of the multitude. If the chief financial officer of the City, in a matter in which the City is largely interested, writes a letter, he should surely be allowed to explain the standpoint
1746 which he occupied and from which he wrote his letter. In other words, if we were even considering the matter as a contract, we should allow the surroundings and circumstances, the surrounding circumstances and the surrounding bearings.

The Court: I understand that, but I do not understand the purport of this particular question.

Mr. Mooney: I am not going to struggle about it. We are all well advised of the fact, as well as the witness, that his answer is

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incomplete, but I am perfectly willing to leave it that way.

The Court: Objection sustained. The City of New York has important and substantial interests, as outlined by the witness. In his capacity as a public officer, in the office he holds, and as a member of the Board of Estimate and Apportionment, which is an office of very high official responsibility he was highly interested in the subject matter of transportation, which is a most important one, that the witness was highly interested in 1748
the so-called transportation facilities on October 6th, 1919, which were in the hands of the receivers appointed by this Court.

The Witness: Mr. Mooney, I don't think that I have finished my answer to your question. I don't think it went any further than in regard to the rapid transit lines. I think you intended that I should include also the surface lines. If I may add that much, if that comes within the ruling.

The Court: Certainly.

The Witness: The City's interest in the 1749
surface lines is that all of them are occupying the streets of the City of New York, many of them under franchises granted by the local authorities, and many of them under legislative grant, made at a time prior to the Amendment of the Constitution of 1875, when the legislature had the power to do that.

Now, in every instance, the municipal authorities are interested in any modification or in the proper exercise of the existing franchises. Besides that, the existing sur-

1750 face lines, and the inadequacy of the service provided by them, was one of the questions discussed, and it was understood at the time the rapid transit enterprises were embarked upon, that they would have a vital effect upon the surface lines operated under these franchises, many of them a half century or more old.

Q. Now, was there at the time of the writing of the letter complained of pending before the Board
1751 of Estimate and Apportionment applications for the increase of fares by or from some of the railroad companies? A. My recollection is there was an application pending from practically every line in the City, if not all of them, nearly all of them.

Q. Now, in addition to the interests which you have specified, was the City of New York interested to a very substantial degree in the question of taxes as affecting the railway systems? A. Certainly.

The Court: Let me interrupt. An an-
1752 swer made by the Comptroller might be amplified: On October 6th, 1919, there was no application on the part of the Receiver?

A. There were applications pending there on the part of the companies of whom receivers had been appointed.

The Court: That is what I want to get made clear.

A. I won't be sure at the moment that there were not applications made by the receivers, although they may have been received at a later time.

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Q. In other words, you don't know to what extent the receivers made themselves parties to the application? A. Yes. Those are matters that can be furnished for the record in precise form at any time if it is required. You asked a question about taxation.

Q. Yes, I will return to that. First, let us take up the question of unpaid taxes, franchise taxes and others. Was the City of New York interested in the solvency or insolvency of the railway companies forming the system, by reason of the taxes already accrued and then due to a very large amount? A. Yes. There is a very large amount of money due the city from a great number of companies; and while there may be some dispute as to whether some of the taxes could be collected, that is whether they are a lien upon the property as distinguished from the companies in personen, nevertheless they were involved in the solvency of the companies and a great many of the items due the city were those for which the city had no protection by way of liens against the properties. There is a great variety of claims that would be subordinate in any vent to the lien created mortgage upon the property.

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Q. And some for which a preference is claimed by the city? A. Yes, and undoubtedly exists.

Q. Then, is it a fair conclusion of the fact that the city was vitally interested in the solvency or insolvency, the successful or unsuccessful operation of the railroad companies from the standpoint of taxes? A. It was more than that, from a great many other points besides, that were more important than that.

Q. Name them briefly. A. Well, in relation to the question of taxation. An increase of fares is an

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indirect form of taxation. Franchises were granted and contracts made for the operation of the rapid transit lines. In the case of the rapid transit lines predicated upon this large investment that I mentioned in the City of New York, and companies were operated under leases. They are not franchises at all, they are mere contracts. Upon the condition that the operation should be carried on at a specified rate of fare. There are contract provisions that determine how the gross receipts from the various companies shall be dis-
1757 tributed, to what purposes they shall be applied, and the Rapid Transit Act contemplates the retirement of all Rapid Transit bonds, even those which are issued by the City of New York for rapid transit purposes out of the sinking funds to be created out of the fare. That, however, is not the entire recourse of the purchasers of the bonds of the City of New York. In the meantime they are entitled to have the annual sinking fund and interest requirements provided out of the taxation.

The proposed increase in fares in a very definite sense was a proposition to levy an additional tax
1758 on the City of New York of about $100,000,000 a year; and that arose from the fact that while the first applications for a modification of the franchise and contract provisions was merely to provide an increase to 7 cents, as matters were pending and the discussion ran on, indications were clearly made that 7 cents would not be sufficient, that 8 cents would be required if the contentions of those back of the applications were sustained, and that even a 10-cent fare would be required.

Now a 10-cent fare on these various lines which have been referred to on the basis as it was in the year ending June 30th, 1919, would mean taking

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from the inhabitants of the City of New York and those who were within the city from time to time, at least $100,000,000 a year in addition to what they had heretofore paid for the same transportation service.

When the municipal authorities were called upon to authorize the franchise holding and operating companies to exact this additional charge from the inhabitants and from people who were within the city from time to time, they practically called upon the municipal authorities to permit them to exact or to collect at least $100,000,000 a year in addition 1760
to what they were authorized under their contracts to collect; and it was a question as to whether or not if that amount of money was to be provided by the City of New York, it should not be provided in some other manner, by some other form of financing in which the city would be interested, or some other method of control or operation other than that heretofore provided, or by some manner of taxation.

The sum and substance of it, however, was that it was an application broadly stated to the municipal authorities to permit the collection of $100,- 1761
000,000 a year in addition to the sum that the contracts theretofore authorized by the municipal authorities permitted.

Q. Now, in the situation that then existed, was a resolution introduced in the Board of Estimate and Apportionment of the City of New York to authorize the application for the appointment of a co-receiver in the proceedings then pending in the United States District Court? A. There was such a resolution introduced.

Q. By whom was it introduced? A. My recollection is that I introduced it.

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Q. And who was the receiver suggested to be appointed? A. The Comptroller of the City of New York.

Q. Yourself? A. Well, whoever might be the Comptroller from time to time.

Q. And was that coupled with a proffer that the Comptroller would make no charge for his services? A. It was offered with distinct limitation and stipulation in regard to it.

Q. And was anyone designated to present that resolution when made to the Court? A. The
1763 Corporation Counsel was authorized by the resolution, as I recollect it, to make the proper application to the Court to get that relief.

Q. Now, while we are on that point, I will ask you whether that authorization to the Corporation Counsel to your knowledge was contained in the resolution. We have the resolution in evidence, but I want to know whether— A. I have a very distinct recollection that it was. In fact, I will go further than that. My recollection is I drew the resolution.

Q. While we are on that point, so as not to lose
1764 sight of it, I want to ask you whether the Corporation Counsel of the City of New York, except when thus designated, is either present in person or by any designated assistant, in the performance of your duties as Comptroller, or in the performance of the acts and duties of the Board of Estimate and Apportionment?

Mr. Caffey: I don't understand that. I object to it as incompetent. In the first place it is irrelevant.

The Court: Question allowed.

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A. No, but I would like to add—

Q. You may. A. Neither the Corporation Counsel nor any of his assistants ever attends any meeting of the Board of Estimate and Apportionment, nor is he ever requested to attend unless a specific matter comes up during the meeting, and he is sent for.

Q. Your answer then will stand that neither the Corporation Counsel of the City of New York nor any of his assistants is ever present in person or performs any service for the Comptroller except upon the request and authorization of the Comptroller? A. I wouldn't say that the Corporation Counsel has not assumed to do such a thing without the knowledge of the Comptroller and perhaps without the knowledge of the Board of Estimate and Apportionment. But I have stated what the relation is.

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Q. I just want the facts as they existed from time to time and in actual practice without referring to legal refinements. In other words, so that we may have a common conception in the suit here: There is an official representative in the Mayor's office of the Corporation Counsel, but that does not apply to the case of the Comptroller, nor to the Board of Estimate and Apportionment? A. No. May I add there is a provision in the charter, that in certain specified cases service of papers in the beginning of actions or of proceedings may be served upon the Corporation Counsel, although their service is also required upon the Comptroller and other officers. And in common practice such papers are served upon the Comptroller although served upon the Corporation Counsel. The law requires it. When received by the Comptroller they are transmitted to the Corporation Counsel with such directions as the case may require.

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Q. So that we may get this record quite plain to those not quite as well acquainted with it, as some of us here are: During the last generation there has been guardedness, has there not, as between the overlapping of the functions of the Corporation Counsel and the Comptroller, which has been the subject of many acts of the Legislature to guard a separation, so far as could be of the functions of the two officers? A. That is true.

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Mr. Mathews: I object to that as entirely immeraterial.

The Court: Objection sustained.

Mr. Mooney: Of course Mr. Mathews has not been here as long as some of us and hence has no recollection of it. This has been a fight for a generation.

I except to the Court's ruling.

A. There is one specific thing I would like to cover.

Q. No, we will just leave it there. When any one wants to read this they will ask what we meant by it and then they will go to look it up. Now, did you know of the passage of this resolution by the Board of Estimate and Apportionment by being present in person at the time it was passed? A. It was passed with the aid of my vote.

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Q. And does the Comptroller of the City of New York, as a matter of fact, have a certain number of votes in the Board of Estimate and Apportionment? A. He has three.

Q. And are there certain matters under the charter that cannot be passed without the presence and the vote of the Comptroller? A. There are a number of matters in which the Comptroller has

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an absolute power of veto and dissent and which cannot be passed over his opposition.

Q. And are these matters principally affecting the finances of the City? A. They are all provisions of law chiefly intended to safe-guard the people against inprovident propositions affecting them financially.

Q. Now, in the course of time, did you know that the resolution of the Board of Estimate and Apportionment, to which reference has been made, was presented to his Honor, Judge Mayer? A. I was so informed.

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Q. In the course of your official duties? A. Yes.

Q. And did you know that co-incident therewith there was—or substantially co-incident therewith there was presented and considered an application for intervention? A. By whom?

Q. Intervention by the City of New York, without describing it. Wait until I get it exact—

The Court: Let him say, if that is so.

A. The reason I hesitated to answer the question was I knew no authorization had ever been given by the municipal authorities for any application to intervene on behalf of the City of New York, but that I had been informed that an application of that character, that general character had been made by the Public Service Commission of the State of New York for the First District.

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By the Court:

Q. In the B. R. T. matter? A. In one or two or more cases.

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Mr. Mooney: I think my question was not quite precise. It was not finished. I will return to it.

Q. I ask you whether, authorized or not by the Board of Estimate and Apportionment, you knew substantially that it was made by the Public Service Commission for the First District in the name and on behalf of the City of New York. That is to say, an application had been made in behalf of the City of New York. Do you know that fact?

1775 A. I was informed that they had made an application of that general character.

Mr. Mathews: I understand your questions as to the knowledge of this witness apply to his knowledge on or before October 6th?

Mr. Mooney: Why, of course.

By Mr. Mathews:

Q. Your answers had that in mind? A. Yes, I knew of these things within minutes after it was

1776 done, sometimes within twenty-four hours, usually within a few minutes after they had transpired.

By Mr. Mooney:

Q. Will you tell us in the official life of New York City, who is the most active and diligent purveyor of news from one branch of the government to another, and from one department to another, and one Court to the other. Are they the reporters? A. I don't know of any that are more diligent.

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The Court: Well, as I have been sitting here for the last month or so I have been wondering whether we had forgotten them.

Q. Now, do you know at what time and under what circumstances those applications came on to be heard, that is to say when they came on to be heard, were they considered together? A. That is my recollection.

Q. And that it came up in connection with, or at a time when the Court had under consideration the question of the appointment of a permanent receiver? A. Yes. 1778

Q. Did you know that it had been suggested at that time by others than yourself and the Board of Estimate and Apportionment, that Mr. Garrison, who was the temporary receiver, should be made permanent receiver? A. Yes.

Q. And did you know generally the conclusions that were arrived at and announced by the Court on those three heads, viz: the application for the appointment of a receiver, the application for intervention and the application for the appointment of Mr. Garrison as permanent receiver? A. Yes.

Q. And did you have these facts in your mind when you wrote the letter of October 6th, 1919? A. I did. 1779

Q. And was each and all of them an important factor in your mind in composing and indicting and sending the letter? A. All. Some more and some less than others.

Q. Now, before the writing and sending of that letter, did you receive more than one communication from Mr. Nixon? A. I did.

Q. And one of them has been spread upon the record as a part of the printed record of the con-

1780 ference before Commissioner Nixon on October 6th, 1919, but the other one, which has been identified by the Commissioner, when a witness on this stand, has been marked No. A, and I hand it to you and ask you whether you recognize the receipt stamp as that of your office? A. I do.

Q. And have you a personal recollection yourself of when this communication came into your hands? I have.

Q. And when did it come into your hands? A. On the morning of Monday, October the 6th.

1781 Q. And the communication itself is dated October 3rd. Is that so? A. Yes.

Q. For the purpose of the record, does the time stamp so indicate? A. The time stamp indicates the date, and also indicates the time, but I wouldn't profess to interpret the way that dial works. I know as a matter of actual recollection, that letter was received by me on Monday morning, October 6th, after I arrived at the office, and before the letter I wrote to Nixon was dictated.

Q. Well, we won't go into the question of the dial. The date, October 6th, 1919, does appear

1782 right on the face of the stamp, doesn't it? A. It does.

Q. Do you know whether that receipt stamp in your office, as applicable to correspondence, is imprinted on the correspondence before it reaches your hand, or when it goes from your hands into that of the stenographer, or other persons to be filed? A. That would depend upon whether the communication was enclosed in an envelop marked "personal." If it is enclosed in an envelope marked "personal," the envelope will be brought to me with the actual time stamped on the envelope. If the let-

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ter is opened, then the direction is given to stamp the letter, so that the actual time stamped on the letter may be a later time than it is actually received. In that kind of a case sometimes the envelope is preserved. More generally they are not.

Q. Now, dealing with this question of these communications from the Commissioner, his attention was called, when he was here as a witness for the Government, to the statement made by him, personally, during the course of that conference, that he had no power, to which he replied in substance, as I recall it"Well, that would make no difference 1784
if I had the power." Now, I want to know what was in your mind when you received those communications, and replied to them, on the subject of whether the Commissioner had any actual power to carry out the purposes of the conference? A. I was very distinctly of the opinion that he had no such power.

Q. And did you know up to within a very few weeks, whether any one has ever asserted that he had the power?

Mr. Mathews: I object to that as irrele- 1785
vant and immaterial and because it comes down to beyond October 6th.

The Court: Objection sustained. The Comptroller has stated that in his opinion the Public Service Commission had no power. That covers the point.

Mr. Mooney: I am asking it, your Honor, because the Commissioner was called as a witness by the Government, and there are certain parts of the Commissioner's testimony as to which the good faith and the bias of the Commissioner is material.

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The Court: To make it more plain: Whatever the different views as to the power may be, the Court entertains no doubt that the witness was sincerely of the opinion that the Public Service Commissioner had no power. Now, whether somebody else thought he had the power seems to be utterly immaterial.

Mr. Mooney: I understand, of course, what your Honor has stated, but it is not upon the point which I am endeavoring to

1787 direct your attention to, and which my learned friend does not seem to appreciate either.

I am dealing now with the question of a witness called by the Government, namely, Mr. Nixon, whose testimony is, of course, assumed to be weighed in the balance.

The Court: I don't think Mr. Nixon goes into that at all.

Mr. Mooney: I want to show that neither Mr. Nixon, nor anybody else, until a very recent date, when self interest or official over-zeal has promoted them, has ever as-

1788 serted that the Public Service Commission had any power to perform the acts which were then under consideration.

The Court: I regard that as immaterial.

Q. Now, did you regard this letter—and I am particularly directing attention to the letter of October 3rd, 1919, from the Commissioner to you—as an unusual and extraordinary communication? A. I did.

Q. And did it have a substantial effect upon your mind in the drafting of your reply? A. My recol-

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lection is that it was the receipt of that letter which impelled me to make the reply. I was in doubt as to whether or not any reply would have been made to the general letter that he had sent out, particularly because being pressed with a great many public matters and not having the time to make a reply, and because I was in doubt as to whether any reply was necessary. I was in that state of mind when I received this letter on the morning of October 6th. That determined me to make a reply to it.

1790

By the Court:

Q. By the general letter, you mean— A. The letter dated October 1st, that was sent to all members of the Board of Estimate, so I am told.

Mr. Matthews: Marked Government's Exhibit 1.

By Mr. Mooney:

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Q. In other words you are referring to the letter which is in the printed book, and which is described as an initial letter? A. I assume that is the one.

Q. Now, that Exhibit A, before you, which is a separate letter, and which you have described, will you state, generally, the impression and result upon your mind made by this letter, Exhibit A, which afterwards found expression in substance, and the extent to which it found expression in your reply? A. In the first place, you will bear in mind that this letter was received at a time when the heaviest work that the Comptroller has to do during the

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whole year has to be performed. That is the closing up of the annual budget, which carries all appropriations for all purposes for the following year. That is, the duty is imposed by the Charter upon the Board of Estimate and Apportionment, but it is one that is generally referred to a committee of that Board, called the Committee on Finance and Budget, of which the Comptroller is Chairman. Under the Statute that budget must be filed on or before October 10th. The sixth was Monday, so that we had Tuesday, the 7th, Wednes-

1793 day, the 8th, Thursday, the 9th, and Friday, the 10th, within which to complete that work. Besides which we had a regular meeting of the Board of Estimate and Apportionment to be looked after on the morning of Friday, the 10th, and I am not also sure but that we had a regular meeting of the Commissioners of the Sinking Fund on Thursday, the 9th, although there may not have been that meeting that week. Now, at that stage of the budget making process there was an overwhelming mass of materials and controverted questions which had to be determined and have to be determined with

1794 expedition because the printing of the budget alone is a task of great magnitude, and the printers' proofs have constantly to be revised, and the budget total mathematically checked and balanced before it can be closed on the night of the 10th, or sometime on the day of the 10th.

There were a number of matters in regard to which hearings had to be granted before the Committee, and some of them had been set down for this very day, Monday, October 6th. In fact, I don't think it is any exaggeration to say we heard upwards of 75 institutions during that day by oral

argument—it was a personal proceeding—they 1795
were personally present. Besides that there were
the appropriations for a great many other public
purposes, all of which I can specify in detail by
reference to the Committee action of that day.
Now, that Committee is due to go in session at
10:30 in the morning, but before calling the Com-
mittee to order the Comptroller has to look after
every kind of an emergency which has developed
anywhere between the end of the preceding week
and that hour Monday morning, which raised ques-
tions that must be disposed of by the Comptroller, 1796
not budget matters at all. I am talking about or-
dinary things that go wrong and cannot wait and
that can only be set right by the Comptroller.
There are common matters—many matters that
ave to be set right in the early hours of every
ay. So I had before me, among those things I
as considering, this letter of Commissioner
ixon, dated the first of October, and while I was
nsidering that, I received this letter which has
en marked Exhibit A, or identified as Exhibit
dated the 3rd day of October, written by the
mmissioner to me, but, as I say, actually re- 1797
ved by me sometime before 10 o'clock on Mon-
morning, and it was that which impelled me
make a reply which would cover both letters.
, I don't know how far you want me to go
detail or explanation of the whole thing at
time—whether you want the letter to be de-
.

What I wanted to do was to get the impress
our mind of this particular letter, if it made
arate impress, and whether you had in mind
nusual aspect presented by the Commissioner,

1798 or your feelings or relations to him, official or otherwise, and as to whether the receipt of that letter from him made a distinct or definite impression upon your mind, which found result in the letter which you wrote? A. Well, it certainly did. My question was whether you wanted me to proceed or to wait for another question.

Q. Proceed, please. A. You will observe that this is in evidence, so that I may refer to the contents of it.

Q. Yes, that is agreed, isn't it? It is marked
1799 "A". Let us make sure of it.

Mr. Matthews: It is in evidence.

Q. You may proceed. This letter marked "A". A. (Witness continuing) In the first place, so far as my relations with Commissioner Nixon are concerned, they were entirely of an official character. There had never been any personal or official friction, or anything of that kind. We entertain different views about public matters, but they have never been permitted by me to be made the subject
1800 of public criticism of him even though his views differed from mine on these things. There is no question of any personal relation involved in dealing with these facts.

You will observe in this letter which I received on October 6th, Commissioner Nixon says: "Owing to certain facts that developed at the hearing on Wednesday I was practically forced to call the conference to which you are invited Monday." Then he also said, "We cannot hope to get the full measure of concessions in advance. There must be negotiations." So that one of the things which struck my mind was that Commissioner Nixon per-

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mitted himself to be drawn into a situation where he had lost his power and freedom of action, and was proceeding practically under coercion, or, as he says, "Under force." He was forced to call this conference, because, as he says, "There must be negotiations." These are his own words, "there must be negotiations" so there must have been some kind of compelling force that compulsorily required negotiations, and in these negotiations concessions of some kind or other had to be made.

Now, I wanted to get the Commissioner where, if he was going to do anything affectively he would 1802
go about it in a way that he would get some results, and would not keep him all the while pursuing a course of action which was not only futile to my mind, but simply annoying the other public officers who had many other duties to perform in dealing with the real solution of these plans which were very vague and complicated.

I had in mind, of course, that there could not be any negotiations by the municipal authorities, so far at least as I was concerned, with the representatives of the traction interests except upon an absolutely equal footing. I had no intention of 1803
going in and sitting down around a table with the attorneys of the traction companies, whom I understood would be there, either from Nixon or from reporters who had advised me of the way this conference was going, except upon that basis. I had no intention of going into any conference with some of the traction attorneys unless we were afforded an absolutely equal footing with respect to the facts and information that they possessed. And I do not see how any public officer can enter a conference of that kind, unless he is in that same free and equal position.

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I had in my mind, also, the fact that before going before that conference—that I, as a public official, and the public authorities, who would ultimately be required to take action on that matter, that is, the Board of Estimate and Apportionment and the Comptroller, as a member of that Board, as well as Comptroller, should insist on getting the same kind of information that the companies themselves had and that their own attorneys had. That we should have the same kind of representation in the receivership. Those are the views I entertained
1805 at the time I received those two letters from Commissioner Nixon and at the time I wrote him my reply. And it was my view then, as it had been at the time that the Board of Estimate and Apportionment adopted the resolution calling for the appointment of a co-receiver, that the only way all the material facts and all the material information can be disclosed, not only to the Court under which the receivers were acting, but to the public authorities who had, in order to live up to their oaths of office, to have first hand information, was by the representation of the City in the re-
1806 ceivership, where, under the direction of the Court, a co-receiver could compel, whether the subordinate liked it or not, the opening up of every nook and every corner of every record and document of every kind which related to franchises, the affairs and the investments of these companies. That is a thing that has never been done up to the present time in the history of the City of New York. It was my view on the 6th of October, as it had been in the preceeding February, that it was only that kind of access to the original sources that could put us in that position, and access, with power under the control of the Court to require any subordinate,

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however recalcitrant, or unwilling he might be, to produce whatever there was in the way of information; and that that information could only be obtained by the City's representative being appointed a co-receiver so that he might, as receiver, obtain any information he desired. So that with that in view and desiring to go to Nixon where, if he could accomplish something, he could put the municipal authorities on the same footing as the traction companies, I wrote this letter of October 6th to him, using language I thought would get into the mind of Nixon, the necessity for that kind 1808
of co-operation, in the expectation that Nixon would gather from the letter that the real necessity that confronted him, and confronted everybody, for that matter, was the necessity that the public authorities be on an equal footing with those representing the traction interests, by way of having all the information that there was in the same way, the effective way, for whatever the effect of it might be, and that the first work that Nixon could do, as he seemed to be on terms of friendly negotiation, at any rate, with the attorneys of the traction companies, was to take the matter up with them 1809
from that point of view, if he was going to have any negotiation with them, and to say, "I think you ought to seriously consider the desire of the municipal authorities for the kind of information and the means of getting at that which they have heretofore asked"; and I haven't any doubt,—at lease, I hadn't any doubht at the time—that if Nixon had considered the letter in that manner, as it was intended to be considered by him, not read it to those attorneys as he seems to have done, but to have taken the subject matter of it and considered it himself, and then asked these attorneys

1810 of these various interests, all of whom, or nearly all of whom, were apppearing in the various receivership proceedings to take such steps as would put the municipal authorities on an equal footing, that he would do the greatest thing that anybody could hope to do in the way of getting these problems solved. In order that he might get the hang of the situation I went into some matters, I referred in my letter to some matters that lately had transpired before Nixon became Public Service Commissioner, so that he would have in as brief a
1811 compass as possible, the whole picture of the urgency and the necessity of the means by which that condition could be met.

That in general sort of way was what was intended to be accomplished in the preparation of the letter.

And I did, also, intend to bring to Mr. Nixon's mind that it seemed to be rather inconsiderate and thoughtless on his part to take the time of the fixing of the budget, the very closing of it—a most inopportune moment—to ask us to give up our other public duties to enter upon a conference that
1812 in any event at that stage would have been conducted with no result.

Q. As a matter of fact you could not have had, without violating your oaths of office, given up the time to that conference on that day could you? A. We could not possibly have done it as a physical matter, no.

Q. It was a physical impossibility? A. That was one of the reasons I had in mind in determining whether I would make any reply to the original letter. That was a fact so patent to everybody that the letter of October 1st required no answer. It was only when I got the letter of October 3rd,

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getting it on the morning of October 6th, that I thought that Nixon was entitled to an expression that would be of some help to him; and at the same time to keep him from ensnarling us in a situation which would be embarrassing and productive of no good result.

Q. In other words, you felt that he had singled you out by this communication for an expression which might not come from the others? A. Well, I don't know how sure—I didn't know that certainly, that he hadn't sent the letter, a letter similar to the tenor of that letter to other members 1814 of the Board. It is a very common thing to approach the different members of the Board separately, to create in their minds the impression that they are the only ones addressed on the particular subject, but I don't say that this identical process was employed.

Q. Now, I will follow along the course— A. There is one other thing I think I ought to add and that is, either by the letters themselves, or by statements given out by Commissioner Nixon, or sanctioned by him, the impression was in the minds of the press and certainly with the minds of the 1815 reporters, and I think so stated in the papers themselves, that Nixon had already obtained written propositions from a number, if not all, of these companies as to the so-called concessions they proposed to make.

He says in his letter, 'We cannot hope to get the full measure of concessions in advance." The implication of that sentence, that he had concessions, but they are not the full measure of concessions, and the statements that were in the news items were that he had these things in writing from the various companies.

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Now, I had no information brought to me before that letter of October 6th was dictated that the Commissioner did not have anything in writing from any of the companies, as a matter of fact, and that as a matter of fact those impressions were unwarranted, I suspected, and without any definite basis. In other words, that the attorneys and the receivers of the railroads had the information—

Q. You thought, in other words, that the attorneys and the receivers of the railroads had the information from the original sources in their pos-

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session which you did not have and, on the other hand, they had made no concessions while through Commissioner Nixon the suggestion was made that concessions had to be made on both sides? A. Yes.

Mr. Matthews: I object to the form of the question. There is too much in it.

Q. I am going to follow along your answer to get one or two additional items, and then I will go back over the ground. Is it a fact then, that you

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did not expect the letter which is complained of in this proceeding to be read aloud, or in public by Commissioner Nixon? A. Mr. Mooney, the last thing on earth that had ever entered my head was that Mr. Nixon would be so foolish as to read that letter to the railroad attorneys that he had to negotiate with.

Q. Now, without throwing into this proceeding any asperities—this is a legal proceeding, and you have referred to the mind of Mr. Nixon, and it is my duty to call from you without unnecessary stricture what you considered his mind to be in this respect? A. Well, I felt that Mr. Nixon was not

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of quick perception of the actual necessities of the situation called, nor of a quick grasp of the verities. I considered that his mind was slow to get the true inwardness of the situation; and in order to bring the thing forcibly into his inner consciousness it was necessary to express the matter with as much vigor and terseness as possible.

Q. I understand from your answer that your mind was particularly sensitive in the sending of your answer and by reason of the fact of his use of the expression "forced"? A. Yes, he indicated that "force" was being applied to him.

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Q. And you did not intend to have any "force" applied to you? A. Not then, nor thereafter.

Q. And you wished to indicate that to him in your letter? A. Exactly, I wanted to indicate that whatever "force," to whatever "force" the Commissioner was succumbing, that so far as I was concerned, I did not intend to proceed upon any other than an unfettered basis.

Q. Well, that is to say, that you resented the suggestion of "force"? A. I don't like to use the word "resented." There was no feeling of resentment. The implication, rather, was that the municipal authorities by one device or another were to be jockeyed or corralled into a position where they were practically without any means of taking care of their official duties.

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Q. Now, is it a fact, from what you have said, that you were not only astonished at his reading the letter in public, but that, in your view, the reading of that letter in public destroyed the very purpose for which it was sent? A. There is no question about it. In the first place, the action of Commissioner Nixon in reading that letter was entirely

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unexpected, and if he had had a moments reflection he would have known it was defeating the very purpose of the letter.

Q. And, from your standpoint, did the reading of the letter in public destroy the purposes of the conference? A. Why, it necessarily had that effect. You would only have to consider what Nixon had said here that these forces were at work, they were the forces in antagonism, and the moment that those—whoever they were—that Nixon said had subjected him to force where he says, "I was prac-
1823 tically forced to call the conference," that they would immediately be disconcerted by anything that upset the action that they had brought about, and as resistance begets resistance, they would exert more force than they ever had before.

Q. In connection with these words, "I was practically forced to call the conference," had it been a subject of discussion by the reporters going back and forth as to whether that conference was called by or under the sanction of the court? A. Well, it was gossip, what we ordinarily in the vernacular call "gossip," to the effect that Commissioner
1824 Nixon's conference was with the sanction of the Court.

Q. But as to the question of "force," the phrase "force," as used in this connection, you didn't understand that had anything to do with any action on the part of the Court, did you? A. No.

Q. Now, when was the letter dictated? A. Before 10:30 Monday morning, October 6th.

Q. Was it dictated to Mr. Van Valkenburg? A. It was.

Q. And after it had been written where was it presented to you for your signature? A. It was

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brought to me in the room that we use for the Committee on Finance and Budget. In other words that is a large reception room in the Comptroller's office where the Committee meets and the office of the Comptroller ordinarily uses for the conduct of business is a room a quarter the size of the court room we are now in, and which adjoins that room.

Q. And when this letter was brought to you was the Committee engaged in other business? A. It was engaged in the business of making up the budget of 1920.

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Q. Had you, between the dictating of the letter and the presentation of it to you for signature, had you been presented with, or had there been submitted to you any first draft or any preliminary striking off of the letter? A. No.

Q. In other words there was no opportunity for revision of the letter? A. Well, I find that I have to do my work in this way. When it is given to the stenographer it is practically in its finished form. If it is changed for any reason it is because of something that has occurred between the dictation and the transcribing, or because of some clerical error, or stenographic error which the stenographer may have made.

1827

Q. Now, this business you had before you that day—you have spoken of the volume and the amount of business—we would like to get its particular significance. Was that on the day the charitable or charity budget of the City of New York was made up? A. We had in the afternoon what is called charitable institutions. In the forenoon we had a number of hearings on matters that, while many of them are not large, they are complicated and, because of the confusion of the law,

1828 or the contradictions in the law, or the conflicts between one office and another, sometimes a small item of a thousand dollars will cause more trouble than an item of one million dollars.

Q. Is it fair to say the letter was written under great pressure? A. It was written under the pressure that was incident to performing the public duties at that particular season of the year. There is great pressure in that office all the time if the work is effectually done.

Q. Well, when this letter was presented to you
1829 for signature, was there anybody present? A. Yes.

Q. Who? A. Why, the Committee was in session, and all of the members of the Board of Estimate and Apportionment are members of that Committee, and they attend, either in person or by the legally authorized substitute, for example a Borough President may be represented by a Commissioner of Public Works, but my recollection is that the full Committee was there that morning, although I think one or two of the Borough Presidents at the time were represented by the Commissioners of Public Works.

1830 Q. Now, was the letter read aloud before it was signed by you? A. When Mr. VanValkenburg brought it in—in the first place, he had to walk clear around the table of the other members to get around to my side to hand it to me. When he brought it in for me to read and sign I said that it was a matter of public question, and affected all of the members of the Board of Estimate and Apportionment—whom I had assumed had received letters af a like tenor to that of October 3rd, and in order to save time, and save my reading it to them, or explaining it to them, I asked VanValken-
burg to read it aloud, while I followed with the

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original, which I had in my hand. He had the carbon, and he read the letter aloud to the entire Committee and all the members of the Board. There was a little brief discussion. There was no dissent by any member from anything that was in the letter, every member of the Board knowing what was in the letter and it was immediately signed and directions were given to transmit it and deliver it by hand forthwith.

Q. And did you then go on with the business on which Committee was engaged? A. Yes. Only for the discussion of the letter—I don't think the whole 1832
discussion extended over a period of two minutes.

Q. Now, I call your attention to that portion of the letter in which you refer to denying access to original sources. Will you, in the first place, tell us what you mean and understand by original sources? A. Well, I meant all of those books, documents, records and memoranda in the possession of the various companies and in their archives that shed light upon the property and affairs of the companies, in whatever manner, shape or form those may be kept.

Q. And you have had considerable information 1833
by experience and knowledge of the ways and means in which the information could either be concealed or exhibited at pleasure? A. I have.

Q. Now, when you used the expression "denied" in that letter, will you please state what you intended and meant by the word denied? A. What I meant to convey to the Commissioner was in having that free and unrestricted access with power to compel any subordinate to produce or dig up whatever it might be, or be suspected of being, all of the facts that related to these different companies, that anything that cut as short of that was

1834 a denial of access to the original sources; and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have someone who was in a position to bring about these disclosures, and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources.

Q. And was it that that you meant by denying access to these sources in the letter? A. It was.

1835 Q. As coincident, or corollary of or supplemental to the denial which you say you meant, flowing from the refusal to appoint a co-receiver, did you have in mind the making permanent of the receivership of Mr. Garrison? A. Well, I didn't have that any more in mind than the fact of the refusal to appoint a co-receiver.

Q. There is some reference in your letter to the fact of a "friendly receiver" or "receivers to the liking"—receivers in the plural—now, you knew at that time that Mr. Garrison had been appointed receiver? A. Yes.

1836 Q. And you knew, did you, that Mr. Sheffield had been made Receiver in Bankruptcy? A. Yes.

Q. And you knew, did you, of the fact that Mr. Garrison had been arbitrator on the nomination of the railway companies before his appointment as receiver? A. Yes.

Q. And you knew, did you generally, that the receiver of the railway company, of the Interborough Consolidated Corporation, had been appointed in an insolvent receivership as an incident to a bankruptcy, on the heels of the loan of a vast amount of money made by them the day before? A. Yes.

1837

Q. And that there was a serious question of the propriety of the bankruptcy of that company and the appointment of a receiver thereof? A. Yes.

Q. And did you know then that certain counsel and officials of the railway companies, that is employees and officers, etc., had been retained in the employ of the receivers and were then in the physical possession of the books and papers?

Mr. Mathews: I object to this form of question. I have no objection to his stating what was in his mind, but the question implies their truth. 1838

Mr. Mooney: We have already developed this.

Mr. Caffey: The question implies the truth of the statements contained in it.

Mr. Mooney: I will go over that and give the names.

Q. You knew that Mr. Quackenbush had been retained by the receivers? A. I so understood.

The Court: In what capacity?

Mr. Mooney: Counsel. 1839

Mr. Caffey: If the Court please, I object to the question on the same ground that I objected before. He is implying the truth of the statements contained in the question. He assumes that Mr. Quackenbush had been appointed counsel for the Receiver when there is no evidence of that in the case. If the witness wants to tell what is in his mind, that is a different thing, as explaining his intent.

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The Court: I think that is a perfectly sound distinction, that the witness can tell what was in his mind. The witness can tell what was in his mind, what he understood.

Mr. Mooney: I am very much gratified to have the learned District Attorney put my question for me, and I appreciate his kindness.

Q. So I will ask you what you had in your mind in regard to those persons in possession of the
1841 original sources of information, of course, dealing with individuals, now, you understand? A. Well, I will have to go back just a step to answer that question. You made a reference to friendly receiverships. I know that these were friendly receiverships in the ordinarily accepted use of that term, in that the complaint and answer comes in at the same time and everything goes forward in the usual manner, in what are known as friendly receiverships. I knew, also, that the appointment, of course, of the receiver had not changed the personnel of those who actually performed the duties
1842 and had charge of the records and properties of those various companies. My recollection is that it had changed it in not more than one particular, and I have information to the effect that even that particular was misleading as to the case of the particular individual, so that, so far as original sources of information were concerned, they were in exactly the same position as they were before the receivers were appointed, and in the hands of the same set of subordinates, officers and employees connected with the various traction companies and that they had been so continued in their respective

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duties by the Receivers. I don't know whether that answers your question.

Q. Well, it is deodorized by reason of the objection of the District Attorney. But even thus deodorized, I think it answers the question. Now, did you have in mind that one of the persons thus referred to by you on a public occasion had endeavored to prevent and announced his intention to prevent access to original sources of information? A. Yes.

1814

Mr. Mathews: I understand your (Mr. Mooney's) question was as to his mind on that day?

Mr. Mooney: Naturally.

Q. And that had taken place, the incident to which you have just referred, in the course of a proceeding which was designed for the purpose of eliciting information in which the public of the City of New York was interested? A. Yes. And I had in mind another thing, that I have been in some receiverships where it was with the greatest difficulty that those having interests adverse to the interests procuring the appointment of the Receiver have been able to obtain any access to original records. I recall an instance where the records have been removed from the jurisdiction of the Court by or through employees continued by the Receiver after the receivership. I had in mind that condition also.

1815

Q. Now, Mr. Craig, will you tell us— A. I had in mind also information that had come to me in one way or another, remotely and recently, with the respect to the transactions of these different

1846

companies, which no human being would ever suppose for a minute would be voluntarily disclosed by anyone identified with the company.

Q. And did you know that when you wrote this letter that information had actually been withheld even under public pressure? A. Yes, I knew that.

Q. And had been withheld even when the person had been subjected to an oath? A. Yes, I knew more than that. I knew that information of that character had been falsified by the persons in possession of the records.

1847

By the Court:

Q. Does that relate to a time during or prior— A. It relates to a time anterior to these receiverships.

By Mr. Mooney:

Q. Now, did you know, that in other instances, the books of these very railways under consideration, had been sold in great quantities to junk men for the purpose of reducing them to pulp, and that they had been reduced to pulp? A. Well, I happened to be associated with some of the lawyers who were in the litigation, whose clients were adversely affected by the destruction of those books. I had known that for a great many years.

1848

Q. That was a matter of public scandal and notoriety?

The Court: I think the matter referred to is a matter of almost common knowledge. Show that the matter referred to by the witness was prior to the receivership.

1849

Q. The fact to which you have referred was prior to the receivership, the actual fact itself? A. Yes.

Q. But the individuals were still alive and are in possession of the books, in many instances, weren't they?

Mr. Mathews: I object.

The Court: Objection sustained.

Mr. Mooney: I think that is a dangerous ruling, but if your Honor appreciates it—

The Court: You may ask the witness the names of the persons.

1850

Mr. Mooney: I have the very best evidence of that, that is the reason I have offered these proceedings.

The Court: The point is what information he had. I don't mean direct knowledge, but what he believes to be the fact, as to any given persons having knowledge of the case. And the objection is sustained, because the question is so phrased that it involves many other things.

A. May I volunteer one thing in regard to companies not involved in these receiverships of which think you probably have no knowledge: I also ad in mind in relation to the records other ompanies.

1851

Mr. Caffey: That is immaterial, if the Court please.

The Court: I will take it.

A. For instance, in the case of Richmond County mediately prior to the consolidation the original records available to the public authorities down

1852

there were destroyed, some of them by fire, and we have to-day such fragments as we have, still bearing the traces of fire, and the real originals as were left in the franchise holding companies.

Mr. Caffey: I move to strike that out.

Q. Was that in your mind? A. That was in my mind, yes, sir.

Q. And did you have in mind that fire was commonly attributed to incendiary origin? A. I have

1853 always understood so, that it was.

Q. Did you have in mind that no statement with respect to the financial affairs of these companies, or the amounts paid out, or expended in construction, improvements, betterments or otherwise could be ascertained at the time of the receivership, except by access to original sources, other than the books of the company?

Mr. Caffey: I object to that as incompetent. It calls for a conclusion and the witness does not state, nor is he asked what his state of mind was.

1854

Mr. Mooney: I intended to. But I will draw out the facts.

Q. Did you know, or did you have in mind the receivership of the New York City Railways Company which was administtred by Judge LaCombe —the Metropolitan Street Railway Company—excuse me, the New York Street Railway Company, which was administered by Judge LaCombe?

Mr. Caffey: I object to that on the same ground and also on the ground that it is immaterial.

1855

The Court: Objection overruled.

Mr. Caffey: I would like to be heard a moment on that. Each of these questions is being so phrased that the record may read as if the witness had testified that all of these are facts, whereas we are only concerned in—the competent fact here is what was his state of mind when he wrote the letter, not whether this is true or untrue, the only question being whether that was in his mind, and in that light to interpret his act.

1856

The Court: I understand. The record will show that it was merely to disclose what was in the mind of the witness when he wrote the letter of October 6th.

Mr. Caffey: I have no objection to that.

The Court: The question now addressed to him is whether the witness had in mind the New York City Railway Company receivership which was administered in the United States Circuit Court originally under the then Judge LaCombe.

Mr. Mooney: I offer for identification a certified copy of Judge LaCombe's memorandum in that receivership touching the question of the books. Just for identification now.

1857

Marked "For Identification, Defendant's Exhibit P."

A. What I understand by your question is whether I knew or had in mind, whether I was familiar, generally, with this—

Q. The incidents of that case— A. As distin-

1858

guished from the fact that I recalled then and paraded them before my mind at that particular moment. I can't say that I did canvas that, or have that in my mind at that particular moment, but I was familiar with them and no doubt it had been given proper weight in the conclusions I had reached. In that sense I had it in my mind.

Q. That answers my question.

Mr. Caffey: I object to that as utterly immaterial.

1859 The Court: I will let the answer stand.

Q. And, were you familiar in the way that you have described, with the opinion and direction of Judge LaCombe to the Receiver handling the receivership on the subject of books, papers and information, which I now hand you? A. I was.

Mr. Mooney: This paper has been marked for Identification as Defendant's Exhibit P. I now offer it in evidence.

Mr. Caffey: I object to it as immaterial and incompetent.

1860 The Court: Objection sustained.

Mr. Mooney: I accept.

Q. At the time you wrote the letter did you know that, notwithstanding that direction of Judge LaCombe's, that the public had failed through their proper representatives to obtain the information covered by that memorandum?

Mr. Caffey: I objection to that as immaterial.

The Court: Objection is sustained.

(29,038)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 488.

CHARLES L. CRAIG, PETITIONER,

vs.

WILLIAM C. HECHT, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

VOLUME II.

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1861

Mr. Mooney: Of course, that is a conclusion. These things are all susceptible of proof. I don't know just where we will end.

The Court: That is a very broad question.

Mr. Mooney: Of course, it is, sir, but I have got to the point where I think my learned friends will do me the justice, and your Honor may certainly rest, dependent upon the fact that I am not going to offer anything that I haven't got the best evidence for. The only thing is that we spit 1862
it out. I will follow it up by the letters to and from the receiver. I will follow it up by the attempt made of the investigation to get at it. I will follow it up by the futility, all of which was known to the—

The Court: Referring now to what?

Mr. Mooney: To the very prototype of this situation under the administration of Judge Lacombe, and unless your Honor is a mightier judge that Judge Lacombe was, you will find that his directions, which were along the lines that you followed, were 1863
flouted and set at naught by the receivers, just in exactly the same way as the Comptroller in his letter claimed.

The Court: I confess I do not see the materiality of that at all, and in the case at bar, there is thus far no evidence of any requests for information to the defendant or members of the Board of Estimate, so that it is an application for the appointment of a co-receiver. The witness states the clause relating to the denial of access, was

1864

in his mind, made up and largely concluded by the denial of the court to appoint a co-receiver. Now, whether under the administration of some other receivership, some books were obtained or not obtained is, to my mind, wholly immaterial, and whether the witness knew that or thought about it is wholly immaterial.

Mr. Mooney: Why, your Honor, if you were to follow that out, there would be no defense in any proceeding for contempt for

1865

the writing of a letter, because we would then be denying the experience and the knowledge of history, you cannot wipe out of your mind in the writing of a letter. You personally are conscious of these facts we are attempting to prove, by your knowledge of the history of this court, and for a person to say that a thing can transpire in this court, that it had almost an exact prototype, that the Judge did what you did, that his acts failed of effect, as the Comptroller in this case claims, that your

1866

Honor's act failed in effect, that is a matter of the actual history of not only of the law, but of the community.

The Court: This court does not propose to be confused in respect to the issues in the mind of the Court. They are extremely simple. The defendant in his letter stated that the court had adopted a policy in effect—I haven't the letter before me at the moment—of denying access to original sources of information. Now, he has stated thus far that what he had in mind, was that the action of the Court in denying the

1867

motion for a co-receiver led him inevitably to that result. Now, that was a perfectly understandable point of view, but whether it was in his mind that through some other receivership or in a series of matters which resulted one way or another and all that sort of thing, has nothing to do what ever with whether this Court adopted a policy of denying access to original sources of information.

Mr. Mooney: Your Honor, I did not want to interrupt you, but you have failed 1868
to summarize the co-relative statements of the defendant, which are, that it was not merely by denying the appointment of a co-receiver, but that it was by the continuation of a friendly receiver and by the employment by that friendly receiver of the same instruments, the same personnel, which had been in the care, which had had the care and custody of the books, papers, etc. It is this combination of elements, and if we prove now that the same combination of elements had existed in a prior case, that 1869
it seems to us would be a complete meeting of the point.

The Court: I think not. I am entirely agreeable to the witness's stating the names of any persons continued in the employ of the Receivers appointed by the Court who had been theretofore in the employ of the transit corporation to make a statement of what was in his mind, that to my point of view would be perfectly proper as a piece of evidence showing what his state of mind

1870

was, his impression from his point of view. That is entitled to consideration.

Mr. Mooney: Of course, I have no power or ability to run counter to the current that your Honor has announced. I fear, however, that we are getting into a very narrow point. I have already announced that the preparation for this hearing is so complete that the entire hearing upon the lines that I am conducting it is not going to take more than twenty-four hours, therefore, the public time

1871

need not be very seriously considered. If a contempt proceeding consists in putting a man upon the stand and just asking him substantially "did you write this letter, and did you have in mind at the instant thereof some matters of instant recollection, "without showing that he, a lawyer, and familiar with the very matters of which I am inquiring and had a familiarity with what had gone before, I think we are not going to get very far.

The Court: I do not care to hear any

1872

further discussion. I have ruled and you may have an exception.

Mr. Mooney: I do except. I am at a loss to know just which way to present the record, because you seem to have made up your mind very fully on the subject and I do not wish to get into any personal misunderstanding. Yet, it is my duty to present my case in the way I have and in the way I think it ought to be presented. I hope your Honor will not take offense at that. I am very serious to present it and I intend to present it to the best of my ability.

1873

Q. I will ask you whether this information contained on the sheets of paper was in your mind at the time that you wrote the letter, substantially, so that I may offer that? A. It was.

Mr. Mooney: Now, I offer these sheets of paper.

Mr. Caffey: Same objection. It is utterly immaterial, has nothing to do with this case.

The Court: Objection sustained.

Mr. Mooney: I except. Please mark them for identification, the four sheets as one number. 1874

Marked "Defendant's Exhibit 2 for identification.

Q. And was the source of your information as described in the paper which has been offered for identification, Defendant's Exhibit 2? A. It was.

Q. Now, Mr. Craig, when you wrote your letter did you know that one of these railroad companies had a set of bogus books?

Mr. Caffey: I object on the same grounds. 1875
The Court: Objection sustained.
Mr. Mooney: I except.

Q. Did you know that one of these railroad companies had a set of so-called unofficial books?

Mr. Mathews: Same objection.
The Court: Same ruling.
Mr. Mooney: I except.

Q. Did you know that one of the railroad officials within this receivership, when called as a witness,

1876 and being under oath, had sworn that there were two sets of books kept by that railway company, one of them official and one of them not official?

Mr. Mathews: Same objection.

The Court: You say "This receivership," you mean the old receivership?

Mr. Mooney: A receivership of the company.

The Court: I mean you are not referring to the present receivership?

1877 Mr. Mooney: No, I am not referring to anybody appointed by this Court in this present receivership, but I am referring to a servant, agent, or employee of a present receiver.

The Court: Objection sustained.

Mr. Mooney: We except to that.

Q. Did you know that an employee of one of the railway companies included in this receivership, when asked why the books were not produced before the Ivins Investigation, under a subpoena, had stated in substance that he did not see that it
1878 would be material to present them?

Mr. Mathews: Same objection.

The Court: Same ruling.

Mr. Mooney: Your Honor having indicated your ruling, I presume you desire counsel to desist as far as possible from the framing of oral questions if there is any other way of presenting the question?

The Court: Certainly, I mean to say that it is helpful from the standpoint of expedi-

1879

tion to refer to the subject matter which you desire to ask about if it be contained in certain papers which you present. My ruling, it will be understood, is not as to matters of form at all.

Q. You are familiar with these sheets of paper that counsel is handing up to you and you have gone over them yourself and worked on them yourself in the preparation for your examination with a view to expedition, have you, Mr. Craig? A. Yes.

1880

Q. Now, I show you two other sets of papers marked V. A. and V. B., and ask you whether the information contained in those sheets of paper was in your mind at the time you wrote the letter, which is the subject matter of this proceeding?

Mr. Mathews: Before the witness answers I would like to look at them. May I ask a question concerning these papers. Do they refer to matters transpiring entirely prior to December 31st, 1918?

Mr. Mooney: That is the present receivership?

1881

Mr. Mathews: Yes.

Mr. Mooney: But I can only couple that direct admission with the statement that it is a continuing matter, because the books of a railway company are a continuing matter and in that sense they relate to the books, records and papers in the very hands of the very receivers that we are talking about. So that in that sense they are current matters. You cannot commence the books of a railway company on the day that you ap-

1882

point a receiver; and that is what our complaint is about. That is what this law suit is about.

Mr. Mathews: Same objection.

The Court: Same ruling.

Mr. Mooney: I except.

Mr. Mathews: Now, in order that the record may be clear, I suppose that these will be marked for identification.

Mr. Mooney: Yes.

Marked "For Identification Defendant's

1883

Exhibits R and S."

Mr. Mooney: We except to the ruling of the Court.

Q. Did you know, at the time that you wrote the letter, that the accounts, and the account books of certain of the corporations in the hands of the Receivers of this Court had been destroyed?

Mr. Caffey: I object on the same ground as before stated.

The Court: Allowed.

1884

Q. Did you know that fact? A. Yes.

Q. And did you know that there was in existence—

The Court: That is, they were destroyed by fire?

Mr. Mooney: Prior to the receivership, yes.

Q. And did you know that notwithstanding the destruction of the books and accounts, that there were in existence certain stub books and memoranda from which the books had been in part reconstructed by an accountant?

1885

Mr. Caffey: I object to that as immaterial.

The Court: Now, did you know is a pretty—

Mr. Mooney: Well, did you have it in mind. We will put it that way.

Q. Did you have it in mind?

Mr. Caffey: It assumes a fact of which there is no proof.

1886

Mr. Mooney: I will tell you just exactly what I had in mind. Of course Col. Caffey wasn't here then, just at that time.

The Court: Was it his belief from what he read in the newspapers?

Mr. Mooney: But we all knew, every man in this room knows it.

The Court: What we read in the newspapers?

Mr. Mooney: It was more than that, your Honor. It was a fact, developed under oath, and I may remind you of the fact yourself.

1887

The Court: I did not mean that. I mean whether the Comptroller knew it from what he had read or from the reading of official records, or—

Mr. Mooney: Let me put it in that way.

Mr. Mathews: I think, sir, Mr. Mooney will get much further and the examination will proceed with fewer objections if he would ask the witness to state what was in his mind. We are not objecting to his leading the witness. He can do that in his reply.

Mr. Mooney: If I did that he might as well discharge me from his employment.

1888

The Court: The question is perfectly satisfactory. I assume you are going to frame it along the lines I have indicated.

Mr. Mooney: I would say this to your Honor: That the evidence I am offering here is all based upon oath and under no circumstances is there hearsay, or flotsam, or jetsam, or anything of that kind.

The Court: Perhaps I had better make myself clear, because I don't think you quite get my point. I think the procedure which

1889

took place in various inquiries prior to these receiverships, generally speaking—I don't confine myself to detail by this ruling—are immaterial. On the other hand, if the witness says, for instance, that either from reading public records or reading or getting information in any other way, which technically would be hearsay, that when he wrote the letter of October 6th, 1919, he had in mind that in previous investigations it had been testified that books had been destroyed; therefore whatever may follow from that,

1890

I have no objection to.

Q. You have heard the ruling of the Court. Will you please—

The Court: What I am seeking to exclude is either the introduction of a copy of such proceedings, upon the ground that I have tried to indicate heretofore, or of the record taking such a shape, that whether these things were testified to under oath or not, that they are now brought in as substantive facts. I think it is only right that

1891

the defendant should disclose to such extent as he and his counsel agree upon what was his real genuine state of mind, what influenced his mind, whether these instructions were wise or unwise, if he desired to lay his mind before the Court it is but just that he should have the full opportunity so to do. I am not seeking to exclude that opportunity under any circumstances, but I do not want the record to get into such a state that collateral subject matter may be mistaken for proof of a substantive character in respect 1892
of matters which occurred before this receivership, and which were in no manner comprehended by any orders of this Court, except in so far as it may be argued that the orders of this Court had a natural, or necessary, or inferable consequence.

Mr. Mooney: I now comprehend your Honor's ruling exactly, and if my learned friend will listen to me in what I am about to say, I think we will save a great deal of time. It is for the very reason, and so as to move along with your Honor's mind, that 1893
I am asking the questions without regard to exact time, date, place or person, so that it shall not have the semblance of proof of a substantive fact, and so that any one who reads this record will say, "Well, Mr. Mooney was proving a state of mind and a state of mind only, because it is destitute of any elements of proof of the substantive fact when he gave none of these particulars." It was for that reason I did not name the place, the time or the occasion and even referred to the accountant as "an accountant."

1894

Now, the reason I am asking you to listen to me while I make this plain, is that we are now upon the very point of this inquiry. In other words, the Comptroller is now endeavoring to make plain that he had in his mind the fact that neither this court nor the receivers nor the mightiest man in God's created world could give him the information which he felt was necessary for the protection of the interests of the city unless he had the right to go and collect, by detec-

1895

tives, by searchers and by investigators the fragments, fragments which had heretofore on another occasion been bound and pasted together skillfully for the purpose of reconstructing these books and accounts.

Why, your Honor, in view of the proof that I am now going to offer, it is nothing but a howling farce for anybody to suggest that a direction to a receiver, that a direction to a subordinate would have supplied this. These men, who have this cloak of respectability thrown about them now, have

1896

been shown in previous times to have done everything possible to prevent the people, to prevent the people of the state and the people of the city from getting at the information which is needed. When they come along here, if they weren't receivers, your Honor would chase them out of the court house with a broom. That is what you would do with them. But, because they are here, having gotten this cloak about them, that they are receivers, therefore representing somebody else, we are in a position where we are supposed to come in here with bated

1897

breath and regard these people as some sort of angels, when we know that in every investigation conducted it has been shown that they have destroyed and gotten away with and suppressed the evidence, and in addition to that, notwithstanding that, that there is knowledge enough in accountancy, and there is skill enough in detectives to reproduce what had previously existed.

Now, that is what the Comptroller wanted, he wanted it that day and he wants it this day.

1898

The Court: You may reframe the question.

Mr. Mooney: Let me reframe the question so that there shall not be any doubt that I am trying to conform to your Honor's views, although I do not wish to be too much circumscribed.

Q. Did you have in mind when you wrote this letter, with respect to the books, records and accounts, of one of the railways in the hands of this receivership that the books—

1899

The Court: That it had been testified.

Q. That the books—that it had been testified—that the books, records and documents had been destroyed?

Mr. Caffey: I object.

Q. But, that nevertheless from stubs of checks and memoranda still extant an accountant could and did reconstruct the accounts of that company in part. Now, that is the question.

1900

Mr. Caffey: I object to that as incompetent. It calls for a conclusion of the witness, and assumes facts not in evidence, and as to which there is no evidence and as to matters which are utterly immaterial.

The Court: I will allow the question up to the point where the witness had in mind that certain books were destroyed. The question will have to be reframed. For instance, I don't know what the latter part of the question means. I don't know whether it

1901

means the witness had that information from some private source or some public proceeding, or what.

Mr. Mooney: Then I will take the answer so far as your Honor allows it and then continue in more definite form for the remainder.

The Court: We will suspend until a quarter past two.

Recess to 2:15 P. M.

1902

Afternoon Session.

2:15 o'clock P. M.

CHARLES L. CRAIG resumes the stand.

Direct Examination continued by Mr. Mooney:

Mr. Mooney: Will you please read the last question?

Last question read by the stenographer.

1903

Mr. Caffey: I object to that question on the general ground that it is incompetent and irrelevant and also that it assumes facts of which there is no evidence, also that it relates to matters wholly irrelevant to the present inquiry.

The Court: I have sustained it except as to that part thereof which refers to the witness having in mind that it had been testified that the books were lost or destroyed and that is where it was left when recess was granted.

1904

Q. Now, will you answer that part of the question which the Court has ruled in, namely, whether you had in mind that it had been testified to that the books had been lost or destroyed? A. Yes.

Q. Now, did you have in mind that it had been testified to that notwithstanding the loss and destruction of those books that an accountant could and did reconstruct from stubs or checks and memoranda the books of the company in part? A. Yes.

1905

Mr. Mathews: Same objection and I want, if the objection is overruled, the question amended so as to show whether or not this was all done prior to the present receiverships.

Mr. Mooney: That is in the question as a matter of what he had in mind.

The Court: Yes, certainly. The matters which you are asking the witness about were matters that had occurred prior to the present receivership.

Mr. Mooney: Yes, but the continuity persists in our view.

1906

The Court: I understand your point, the witness may answer.

A. Yes.

Q. And when you wrote this letter, and referred to the original sources, did you have in mind such original sources as are referred to in your answer to the last question? A. Well, I had that and more.

Q. Yes. A. I had included in the original sources, not only books and entries, but documents and memoranda and agreements and a great variety

1907 of matter of that character.

The Court: Writings of all kinds?

A. Yes, bearing particularly upon the relations of these companies to the municipality of the City of New York and to each other, and to their obligations.

Q. And did you have in mind grants, franchises and other papers that were not ordinarily accessable? A. Yes, sir.

Q. Now, did you have in mind— A. Let me add to that: Particularly those contractual instruments

1908 which related to, which estabished relations between the different companies and which were not a matter of direct public grant.

Q. Now, did you have in mind that it had been testified to that a number of the stubs— A. Just a minute. May I add to that last answer just a few words?

Q. Yes. A. And also the action of the different companies holding these grants in pursuance of those various agreements, etc.

Q. Now, did you have in mind that it had been testified that in the work of reconstructing the

1909

books and referring to the stubs of the checks, that the payees' names were omitted in a great many instances and that the checks themselves had disappeared, or had been destroyed? A. Yes, sir.

Q. And that the purpose of the payment had also been omitted? A. Yes.

Q. And that notwithstanding that by the skill of accountancy and investigation it was possible to reconstruct the books in part? A. Yes.

Q. And did that reconstruction relate to and did the matter referred to, relate to matters of importance and financial interest to the City of New 1910
York? A. They did, and if you wish, I can just add a little to that.

Q. Give a brief illustration of what you had in mind. A. What was pending before the municipal authorities was in substance an application for the revision of the franchises and contract obligations based, not upon the legal grants, but rather upon some equitable claim, supposed to have arisen out of the changed conditions of the times. Now, that application went to the very heart of all of the equities that there were in the franchises, and the inequities, too, if any there were, and the contracts 1911
that had relation to them. In other words, the Board of Estimate and Apportionment could not properly act with regard to any application to amend an existing franchise in any particular, or to supersede it by a new grant, except upon conditions that would be entirely just to the public at the present time.

Q. Now, did you have in mind that the information that you have referred to was not in the personal or mental possession of the receiver appointed by the Court, but that you would have to go further than that to obtain the information? A. I had in

1912

mind that it was in the archives of the several companies.

Q. Have you had experience yourself in such work of investigation and accountancy with respect to original sources for the purpose of ascertaining the truth of such matters? A. I have.

Q. It is a little out of order, but I will ask you to mention at this point any fact that you had in mind with respect to markings and obliterations of markings on records of some of these companies.

1913

immaterial and irrelevant. It has nothing to do with the issues in this case. We are not here going into the question of whether—

The Court: I will sustain the objection. I understand, of course, that unless you in-

Mr. Caffey: I object to that as entirely dicate to the contrary, that this question and other questions are directed to the matters which the witness had in mind as having occurred prior to the present particular litigation.

Mr. Mooney: Again with the qualifica-

1914

tions that I have spoken of, that a set of books as sources of information are a continuing thing.

The Court: Yes, I understand that.

Mr. Mooney: Now, I will put my questions specifically.

First I will except to your Honor's ruling. Then I will put my questions specifically.

Before doing so, may I say to your Honor, that the conference of Counsel during the luncheon hour has resulted in the thought that I should present to you, and

for your consideration, a case that is well known, but still has to be recalled, perhaps, to your Honor's mind: This, of course, is a quasi criminal proceeding. Now, your Honor probably will recall, as soon as I mention the title of the case, the Thaw case, where the state of mind was allowed to be shown by statements of facts, whether of ancient or recent origin, which produced in the mind of the person sought to be charged, a condition which found expression in the overt act. Now, that case was so well considered and so carefully decided, that it may have a bearing in your mind, as it certainly has in ours, which is applicable to the questions that are being asked here.

The Court: I understand that.

Mr. Mooney: You catch the point?

The Court: Yes. I sustain the objection to this particular question. I have already allowed some questions as to the state of mind.

Mr. Mooney: In view of the ruling that you have made on the question of the state of mind, I feel that the record might be made clearer if I return to another question that was asked. That was with regard to the bogus or so-called unofficial books. May I reframe that question to come within what I understand is your Honor's ruling?

The Court: Yes.

Q. Now, when you wrote this letter, did you have in mind that it had been testified to by an official of the railway company, which was in the hands of this receivership, that there were a set

1918

of books known as an unofficial set of books, as well as a set of books that had been produced upon a public inquiry under oath?

Mr. Caffey: I object to that as entirely immaterial.

The Court: Overruled. I will allow it.

Mr. Caffey: I except.

A. Yes.

Q. And did you have in mind that it had been

1919 testified to by the official referred to, that the reason for not presenting the unofficial set of books, although they were also subpoenaed, was that they were not regarded as material? A. Yes, that is not so regarded by the witness subject to the subpoena.

Q. And the witness and his counsel and certain officers of the railway company who had conferred upon the subject? A. Yes.

Q. And did you have in mind that it had been testified that the production of the unofficial set of books in the instance referred to would have

1920 only tended to confuse the figures, or words to that effect? A. Yes.

Q. And that the unofficial set of books did vary in material respects from the official set of books? A. Yes.

The Court: Of course, I assume the record is clear: These answers are all directed to testimony which the witness understood was given at a time anterior to the present receivership.

Mr. Mooney: Yes, sir.

1921

The Court: And coupling that again with your statement that you regard the books as a continuing matter.

Mr. Mooney: Quite so.

Q. Did you have in mind that it had been testified to that the vouchers, namely the checks of one of the companies in the hands of the receivership, had originally borne upon their face two little dots indicating a corruption fund, and that when the investigators were appointed by the State Legislature that those had been altered by the person in whose possession they were, by erasing the two little dots?

1922

Mr. Mathews: Same objection, sir.

The Court: I will overrule it.

Mr. Mathews: I except.

A. Well, I had in mind that situation, but not quite as you have stated it. That is, I knew that those records were not at that time in the possession of the receivers.

Q. That is to say— A. But I knew that they were available to the receivers, if the receivers knew how and to whom and under what kind of circumstances to give the directions to get them, if the Receiver really wanted them.

1923

Q. In other words, that they rightfully belonged to the Receivers, but that they were not in the possession of the Receivers? A. I would not pass upon the question of whom they rightfully belonged to, but they were available to any Receiver who wanted to lay the whole thing before the Court.

Q. And did you know that this corruption fund

1924

just referred to, amounted to a vast sum of money? A. I did.

Mr. Caffey: That is objected to.

Objection sustained.

Mr. Caffey: I move to strike out the answer. You have got the wrong form of question.

Q. Did you have in mind that it had been testified to that the corruption fund thus referred to

1925 amounted to a vast sum of money? A. I did.

Q. And did you know that it had been testified to that that had been charged to an account which the City of New York would be directly interested in if these applications were to be considered and passed upon? A. I had in mind that that corruption fund was used to corrupt one of the public bodies from whom franchises were obtained for certain of the companies in the receivership, which franchises the municipal authorities of the City of New York were being asked to recognize as valid in every respect and entitled to full respect, and

1926 to have amended in such form as to give an increased return to the companies.

Mr. Caffey: I move to strike out the answer as not responsive to the question and also—

The Court: Motion granted.

Mr. Mooney: I except to that.

A. I cannot quite answer that question yes or no, Mr. Mooney. That was the reason. That cannot be answered yes or no in the form in which you

1927

put it, and that is the only reason I did not give you a direct yes or no answer.

The Court: Suppose you repeat the question.

(Senographer reads the question.)

The Court: The witness said he knew the facts.

Q. Now, did you have in mind? A. The difficulty in your question is about its having been charged to an account.

1928

Q. I will omit that. Omit "charged to an account." Now, will you state, please, what you had in mind, that it had been testified to upon the general subject matter of that question? A. I had in mind that there was—

Q. That it had been testified to— A. That it had been testified to that there was a corruption fund of several hundred thousand dollars that had been used for corrupting one of the public bodies from whom franchises had been obtained, and that are now in the ownership of the companies, some of them, in one of the receivership, and which franchises the Board of Estimate and Apportionment was being asked to recognize as the basis for increasing the fare. In other words, that that set of franchises had been illegally and corruptly obtained and yet we were asked to make it the basis of some kind of consideration, as though it had been obtained in a manner in every respect rightly, and that this fund had been used for this purpose.

1929

The Court: Are you now referring to 1884?

A. No.

1930

Q. I will ask you what railway did this refer to? A. The Nassau Electric and subsidiaries.

Mr. Caffey: I move to strike it out as entirely irrelevant and immaterial to this issue.

The Court: Motion denied.

Q. Now, did you have in mind that it had been testified to with respect to another railroad company that there had been a sum of $965,000.00 which had also been used for corruption purposes?

1931

Mr. Mathews: Same objection.

The Court: Objection overruled.

A. I did not understand that all of it had been so used.

Q. Well, $900,000.00 or thereabouts of it had been so used? A. Yes.

Q. And for the purpose of identification was that the Wall and Courtlandt Street Ferry Railroad Company enterprise? A. Yes, but I think there is quite a substantial deduction from the $965,000.00.

1932

The Court: Well, there was some amount.

A. Yes.

Q. $715,000.00, that gets nearer to it, doesn't it? A. Yes, that is right.

Q. And had you in mind that one of the railway companies in the hands of the Receiver at the time of this receivership had, at a time anterior to the receivership, paid out the sum of $500,000.00—that it had been testified to that they paid out the sum of $500,000.00 for political purposes, another sum

1933

of $264,747.24 for political purposes, another sum of $17,000.00, and another sum of $18,000.00; those two latter being coincident, and another sum of $37,942.00 and still another sum of $250,000.00, all of which it was testified had been charged as proper expenditures on the books of the companies.

Mr. Mathews: The same objection, if the Court please.

The Court: Objection overruled.

1934

A. Yes, sir.

Q. And did you have in your mind, at the time, that it had been testified to that entries had been made upon the books of these companies for the purpose of covering up these amounts which you have mentioned? A. Yes.

Mr. Mathews: Same objection.

The Court: Same ruling. The answer may stand.

1935

Q. Now, did you have in mind that the payments referred to would affect the financial interests of the City of New York in the matters or applications that were pending in connection with an increased fare, or a re-arrangement of the franchise relations with the railroad companies? A. I not only had that in mind, but that also, that all of these matters affected the equitable consideration to which these franchises were entitled.

Q. And did you have in mind that if these figures had been traced, that there were likely to be other figures that should be traced? A. Well, that was a fair inference that I had in mind.

Q. And was your state of mind such that you

1936

were willing to pass officially upon any application then pending or suggested for consideration at this conference without a full investigation of those matters? A. I was willing to pass upon any question as expeditiously as it could be taken up and determined, but only upon the disclosure of all the material facts, or with such access to the information, necessary information, so that we would have a definite assurance in mind that nothing was being withheld which was material or which would materially affect the disposition of those questions.

1937

Q. And, in your opinion, and in your judgment, as a public official, would these matters to which you have referred, have materially affected your judgment? A. Why, unquestionably, and the judgment of any other public officers who had to deal with these matters. Let me illustrate that, if I may. A franchise sold, for example, at public auction, when it came to a question of amendment, or modifying the terms in favor of the franchise holder, would stand upon a far different basis than a franchise admittedly obtained originally by corruption, and the legality of which had been sus-

1938

tained, although the parties who granted the franchise had been jailed for corruption.

Q. Now, did you have in mind that it had been testified with respect to the original Broadway franchise, which was in the hands of these receivers, and [illegible] which an application was pending for a readjustment of fares, and a conference was called, that it had been testified that that was obtained by corruption, and so established by the judgment of the Court in the case of People vs. Sharp? A. Yes.

Q. And that involved, did it not, a million dol-

1939

lars, or thereabouts, according to the proof within your mind? A. Yes.

Q. And did you have in mind, also, that it had been established by our Court of Appeals in the case of the People vs. O'Brien in 111 New York, page 1, that notwithstanding the corruption by which the franchise was obtained, it was still a franchise that had to be regarded from its legal aspect? A. I had in mind more than that. My recollection is that the Court of Appeals held further than that, in that case, that that franchise was a contract and protected by the contract clauses of the constitution.

1940

Q. And did you have in mind that if anyone were seeking—that if anyone of these railroads through their receivers, or otherwise, were seeking either a readjustment of fare, or a readjustment of franchise, or a change in the franchise, that the consideration of that question would, notwithstanding the decisions of the Court as to the legal effect, enter into the judgment of yourself as Comptroller, and as a member of the Board of Estimate and Apportionment as to what should be done on such readjustment? A. Certainly.

1941

Q. I am not clear, as Counsel, that I understand the thing fully, but I will put the question this way: From the way that you had in mind that these sums had been charged on the books of the company, would it have been in substance and effect, if there had been a change made in the relation with the railway companies, that the people would be paying for the corruption fund that had been expended in the franchise matters?

Mr. Mathews: I object to that.

The Court: Objection sustained.

1942

Mr. Mooney: I except to the ruling of the Court.

Q. Did you have in mind that with reference to certain of these railway companies it had been testified that there had been a change in the valuations of their franchises and franchise rights of hundreds of thousands of dollars, where in one instance only one-quarter of a mile of railroad had been built? A. Yes.

1943

The Judge: Is this also—

Mr. Mooney: Long prior, but still in the books which were and should have been in the hands of the Receiver.

A. Still affecting the franchises that continue to this day.

Mr. Mooney: Yes.

The Court: The testimony was given as to that sometime anterior to these proceedings.

1944

Mr. Mooney: Yes.

Mr. Matthews: I understand that nothing so far brought out from this witness, except where specifically specified, has applied to anything after the beginning of the receivership now pending.

Mr. Mooney: Well, of course the constant reiteration of that statement, your Honor, is like asking a man to come in Court and sweep him out at the same time. We would not be talking about it if it were not.

The Court: This last question I asked about, because I did not know what it re-

1945

ferred to, and I wanted to be certain as to whether it referred to something anterior to the receiverships or subsequent. Some of these matters are, of course, almost in a sense matters of common knowledge and many of them are familiar to the Court; whereas the question was a bit blind as to the last one, and I didn't know whether it referred to something which took place prior to the present receivership or not.

Mr. Mooney: I will answer as to all of these questions, your Honor, that it is not 1946
claimed by the defendant, in this case now, nor has it ever been claimed by him, that the receivers were dishonest or that they had made any expenditures, or that they had contracted any expenditures. That whole thing is utterly beside the mark. The contention of the Comptroller is, and always has been, that he wanted access to original sources. Now, of course, original sources—that is the whole purport of the communication here, and original sources naturally go back to original times and are 1947
all anterior to the appointment of the receiver.

The Court: I think that statement covers the situation and there will be no need of repetition.

Mr. Matthews: The fact that we claim all this is entirely beside the mark in this case and is absolutely immaterial and irrelevant.

The Court: I understand.

1948

Q. Just for the purpose of keeping the narrative in front of us, your last answer referred to the 6th Avenue Railroad Company, did it? A. It did.

Q. Did you have in mind, at the time you wrote this letter, that the cost per mile of the 34th Street Cross Town Railroad Company had been charged in gross at $6,472,287, or thereabouts per mile? A. Yes.

The Court: That is objectionable in form: That it had been testified to.

1949

Q. Did you have in mind that it had been testified to? A. Well, whether it had been testified to or whether it was a matter of public record with which I was at one time familiar—

Q. I will ask you here, whether you had those public records right at your hand, and, in fact, many of them right in your own personal office as Comptroller? A. Well, I had them both ways. I had them in my own personal office, as a practicing lawyer before I became Comptroller, a great many of them, and then as Comptroller I had other

1950

records which belonged to me in my official capacity.

Q. Now, do you know that it had been testified to or that it had appeared in official reports that the cost per mile of the Fulton Street road, which was only a horse road, was $2,553,097, or thereabouts? A. Yes, sir.

Q. And as against those extraordinary figures, was it in your mind, at that time, that it had been testified to or was the subject of public record that for underground trolley on another line, namely, the 8th Avenue line, it had only cost $166,-

1951

000 or thereabouts, per mile? A. Well, I had that, and I had information also outside of that, that some of the underground trolleys ran as low as $135,000 a mile, and in some cases as low as $115,000.

Q. And that the horse railroad, in comparison with the $2,500,000 a mile, did you have, in your mind, that it been testified, or was in the reports, that another one had only cost $24,000, or thereabouts, per mile? A. Yes.

Q. Now, did you have in mind that it was necessary for you to get at the facts from original 1952
sources with reference to those costs for the exercise of your judgment in your official capacity as Comptroller, and a member of the Board of Estimate and Apportionment? A. I did, and in no other way could the equity in any of these properties which the public authorities were being asked to recognize be ascertained, in my judgment.

Mr. Mathews: I move to strike the answer out as not bearing on any of the issues in this case. It is a conclusion of the witness.

The Court: I will let the answer stand, 1953
because he has added to it "in my judgment."

Q. Now, several of the witnesses for the Government have testified that they obtained information from former employees of the company who had charge of the books and were continued in charge of the books from time to time—that is, they obtained the information from time to time. Now, did you have in mind that in the access which you have testified was needful to you that you needed

1954

the services of individuals to make that plain and understandable? A. Certainly.

Q. And, did you have in mind that only individuals in the employ, or owing a fealty, or duty to the interests which you represented as a public official, could furnish that information? A. Yes, in the sense that they would have to be responsible for the manner in which their work was done.

Q. And had you had experience, as a lawyer, in connection with the results or statements made by public accountants, with respect to costs of con-

1955

struction, the items entering therein and the matters incidental thereto?

Mr. Caffey: I object to that as immaterial.
The Court: Objection sustained.
Mr. Mooney: I except.

Q. Did you have in mind, at that time, that any accountants of the railroad company could, or would, disclose those facts which you considered necessary in the exercise of your judgment as an official?

1956

Mr. Mathews: The same objection. It is immaterial.

The Court: Question allowed.
Mr. Mathews: I except.

A. I cannot answer that yes or no.

The Court: Answer in your own way.

A. What I had in mind was this: That an accountant, or anybody else, would produce the kind

1957

of information, or the character of information that is required to be produced, if he is left alone, he will produce almost any sort of a result, which may or may not reflect in its conclusions beyond underlying facts, but work of this kind has to be done under direction, and the accountants themselves have to be intelligently directed with the view of ascertaining the facts that are material from the point of view of the inquirer.

Q. Now, I think I can put the next question with that help understandingly: Was it, in your mind, that an accountant produces evidence from 1958 the surface of the books, and that you, as a public official, in the discharge of your duties, to which you have referred, desired to go below the surface and find out what the real facts were? A. Yes.

Q. Did you have in your personal book case, if I can use that word, or the book case that is right at your hand in your personal office as Comptroller of the City of New York, the very volumes that are produced here of the investigation commonly known as the Ivins investigation, which have been marked for Identification as Exhibit M.

1959

Mr. Mathews: I object to that as entirely irrelevant and immaterial, what books he had in his library.

The Court: He may answer yes or no.

A. I do not think I had those particular books on that particular day, but they were in that particular book-case, because I think the book-case was brought in later, but they were in the department, or under my control and direction somewhere, the records of nearly every public investi

1960

gation that has been conducted, and in some cases a number of copies of the record are on file in our office in different places, so as to be accessible when these matters come up.

Q. And were you familiar with the condition of this investigation that I am asking you particularly about, the Ivins Investigation, socalled? A. I was.

Q. I notice the books bear your imprint "Charles L. Craig, Comptroller of the City of New York"? A. Well, that is only to distinguish

1961

them. They are not my personal property, they are the property of the City of New York.

Q. And there are marks running through all these books. Are those your personal marks, or some of them? A. Some may be and some may be of others, because those have been worked on by other people under my direction.

Q. Now, has a compendium been made up by and under the direction of your Counsel and under your supervision of the testimony contained in this investigation, known as the Ivins Investigation? A. Yes.

1962

Q. And are you familiar with that compendium? You have been over it with Counsel? A. Yes.

Q. And is this the compendium (handing same to witness)? A. It is.

Q. Has that been prepared for the purpose of economy of space, consisting of about 34 pages, for the purpose of presenting those matters which appear to you and your Counsel to be relevant to this inquiry? A. Yes.

Mr. Mooney: Now, as a means of placing it on the record in the most condensed

1963

form, I will offer the compendium referred to by the witness, and I offer as the basis thereof the official publication itself.

Now, just let me say one word there for the convenience of the Court and for the aid of my adversaries, if they consider it such. These 34 pages I think will elucidate the situation very considerably as an amplification of, a supplement to, the oral examination of the witness. I can see no possible harm to result therefrom, and much good.

1964

Mr. Mathews: I object to it on the ground that it is incompetent, irrelevant and immaterial, even though it may be considered as an original document, as distinguished from a copy or a compendium based upon an original document. The original itself would not be competent.

The Court: I will receive it on this theory: Not that it is any evidence of facts, but as a compendium of what the witness had read, as showing what information he had in mind when he wrote the letter.

1965

Received in evidence and marked "Defendant's Exhibit T."

The Court: Now, it will be understood, of course, that the original papers may be referred to in the event of any errors or corrections.

Mr. Mooney: Oh, by all means.

Mr. Mathews: May Counsel have a copy of that in case we want to check it up?

Mr. Mooney: Certainly.

1966

The Court: In other words—I think my ruling is quite clear,— It is not a matter of any relevancy as to whether a witness was right or wrong in the Ivins Investigation, or in the other investigation in testifying to this, that or the other thing. I am ruling that it is relevant, that the witness may state what information he had in mind and had gathered by reading, or information otherwise obtained which was present in his mind at the time he wrote
1967 the letter complained of.

Mr. Mooney: I understand you exactly. That is just the aspect in which the compendium is offered.

Mr. Mathews: It is understood, of course, that the Government objects to it, even assuming that the witness had it in mind, that is, it is not relevant or material, nor is it competent on this particular trial, and it is not within the issues at all.

Q. This compendium, which I now show you, is
1968 that a compendium of the Minutes of the Grand Jury which have been produced here, and which is prepared in the same way that the other compendium which has been offered in evidence was done? A. It is.

The Court: As I understand the witness went over this himself?

Mr. Mooney: Yes.

A. Yes.

Mr. Mathews: Same objection.

1969

The Court: Overruled. This compendium is received for the same reasons as the previous compendium was received.

Received and marked "Defendant's Exhibit U."

Q. Now, did you have in mind, after your consideration and study of the situation, as disclosed by the testimony referred to, that those proceedings left unconcluded the matters to which they referred? A. I did. That is to say, that many of those investigations had no definite objective 1970
and traveled along certain lines to a certain point and then stopped without leaving an answer to the inquiry in any conclusive fashion.

Q. In your mind, were the results produced by those investigations such that a financial person, or a person having to do with finances, could thereby inform himself of the facts necessary for his judgment? A. May I answer that other than yes or no?

Q. Yes. A. Read it to me, please.

The Stenographer reads question to wit- 1971
ness.

A. There were other than financial questions presented. There were questions of policy presented with reference to the revision of the outstanding franchises, and on those questions, as well as on the financial questions involved no one could intelligently pass without the completion of all the inquiry, that was merely suggested in many cases in these other examinations. In fact, the disclosures of the examinations, the Ivins examination, and others, were mere notice to the public

1972

authorities, and in dealing with these matters they had to sift them to the uttermost in order to arrive at anything like a just conclusion as to what the facts and the merits were.

Q. Did you have in mind that many of these matters thus opened up in these investigations had never been carried to a conclusion? A. I did.

Q. Do you know that there never has been a statement of the financial operations of these railways covering the items which you had in mind as necessary for the exercise of your judgment?

1973

Mr. Mathews: I object to it, the form of the question, also that it is irrelevant, immaterial and incompetent.

The Court: Objection sustained.

Q. Well, we have spoken about certain investigations of certain railways. Has there ever been an investigation of the B. R. T. situation?

Mr. Mathews: I object to that.

The Court: Objection sustained.

Mr. Mooney: I except.

1974

Q. Did you have in mind that it was testified, that it had been testified, that some of these accounts were based on a private check book of one of the officials of the railroad which was carried around in his pocket? A. Yes, sir.

Q. And that the vouchers therefrom had been destroyed? A. Yes.

Q. There is one point that I overlooked when I was asking you about the letter. Was there, on October 6th, 1919, a system with respect to additional sheets known as carbon sheets, in use in the

1975

office of the Comptroller of the City of New York, applicable to letters not intended for publication, and another for letters that were intended for publication? A. Well, there is a routine for the kind of paper and the kind of carbons to be made on matters for publication and on matters that are not for publication.

Q. Describe that briefly. A. Well, the routine on matters for publication is to prepare a large number of copies; they can be run off at one time by the use of thin paper and good carbon, and that is put on a form of paper ordinarily known to the 1976
legal profession as legal cap, although we have a different term for it. Now, communication of which only one copy is required, and that is the carbon copy for office purposes, one carbon copy, besides the original to be transmitted to the addressee, which is made on ordinary letter paper, is made.

Q. Now, in this instance of the writing of Exhibit No. 2, which is the letter complained of— A. Let me add—I may say in explanation of that that those instructions were always given to the stenographer at the time of the dictation, as to what kind of paper to use and the number of copies.

1977

Q. When you dictated this communication, which is Exhibit 2, the one complained of, will you state whether you gave instructions with reference to the carbon copies? A. Well, the only instructions were just for an ordinary letter, that is the ordinary office copy. That is the ordinary routine, and would not require special instructions for any other kind or any additional number of copies.

Q. Are we to understand from that that no express instructions were given with reference to the carbon? A. No. That is the correct understanding. In other words, this was an ordinary letter

1978

to be transcribed on the ordinary letter-head for transmission in the ordinary way, with a carbon, merely for office records.

Q. And not for publication? A. And not for publication. No carbon for publication.

Q. And, as a matter of fact, when the paper itself, Exhibit No. 2, was presented to you for reading, and you read it and Mr. Van Valkenburg, as you testified, read out from the copy in his hands, was he reading from that kind of a carbon which is not intended for publication? A. Yes. In other

1979

words, I had in my hand and I was reading this as he read it. I had the original in my hand, unsigned, and was scanning it over for any kind of errors I might detect, while he read aloud from the carbon, which is on the same size paper, simply a yellow sheet, the same size sheet as this letter here.

Q. And that same kind of a sheet was not a sheet intended for or to indicate publication? A. No, that is merely for the office files.

Q. Did you authorize directly, or indirectly, the making public of the letter, Exhibit 2, or any copy thereof?

1980

Mr. Caffey: I object. That calls for the conclusion of the witness.

The Court: Yes. I will sustain the objection on that ground only.

Mr. Mooney: My learned friend is oblivious to the fact that I am proving a negative, however,—

The Court: No, no.

Mr. Mooney: —if he objects I will except to that.

Q. Did you say to anybody to give out that letter for publication? A. No.

1981

Q. Did you directly, or indirectly, say, or do anything towards the giving out of that letter for publication?

Mr. Mathews: I object to that.

The Court: Same ruling. Objection sustained.

Mr. Mooney: I except to that.

Q. Did you have anything to do with the giving out of that letter for publication?

1982

Mr. Mathews: Same objection.

The Court: You mean physically?

Mr. Mooney: Well, I will take it that far, anyway.

Mr. Mathews: I think it is still objectionable, sir.

The Court: I will overrule the objection.

Mr. Mathews: I except.

A. Nothing whatever, except to sign my name to the original and hand it to the stenographer for transmission by hand to Public Service Commissioner Nixon.

1983

Q. You mean to be exact in your answer by answering that it might be claimed by someone that the sending out of the letter from your hand was a publication? A. Yes, and the other thing—of course, any document of record in the Department of Finance is a public document, so that in a sense the moment this was laid down in the letter book—that is, this is copied by a letter press as well as by a carbon copy—those are public records to which any tax payer has access at any time, and to which access is never refused, even to a person who might not be a tax payer.

1984

Q. Even as one of the witnesses said, "If it was the Citizens' Union." A. Even if it was the Citizens' Union. In other words, we make no discrimination by reason of race, color or previous condition of servitude, as to whether a person shall have access to any kind of document or records in the Department of Finance. As a matter of fact, I may say further, that as the result of large appropriations made for the purpose of preserving those records to public use, there are huge vaults under the Hall of Records, where those records, after a certain age, are kept, and they are at all times accessible to the public upon a mere request, just sufficient supervision to see that there is no alteration or abstraction made.

1985

Q. And you are speaking both of the law and the fact. By the charter these are public, are they not? A. Yes.

Q. Now, so that I shall not leave anything uncovered, I am going to put the same question mentally, or to the mental act, as we did to the physical act a moment ago. Did you do anything, as a mental operation, towards giving this out for publication?

1986

Mr. Mathews: I object to that.

The Court: I will take it.

A. I don't know exactly what your question means.

The Court: I presume the question might be put in this way: In the first place, I gather that your testimony is that you gave no directions to any one person whomsoever to give this letter out for publication?

A. That is correct.

1987

The Court: And that you had no intention at the time to the effect that the letter should be published?

A. I have not ben asked that question. As I understand it, I will be glad to cover that ground, if there is a question pending.

Q. Do so. A. When I dictated that letter and signed it, it went out of my mind. I had a thousand other things to occupy my attention, to think about, and I probably would have given it no more thought, no further thought, had not some commotion developed in regard to it somewhere around the luncheon hour. As I said here, at the forenoon session, this letter was intended to convey suggestions to Public Service Commissioner Nixon and in the light of which, and the facts and the statements contained in the letter he could shape a course of action which would bring about a condition where the public authorities would be in a position to confer not only with him, but with anybody else, with respect to the matters that were involved. There was never any thought that Nixon would read this letter to anybody else. In fact, I have a faint recollection, although I would not be positive about it, that my instructions were to put this in an envelope marked "Personal" for Nixon, himself, so as to avoid the possibility of its falling into the hands of some person connected with the Public Service Commission who might otherwise disclose it and act upon it.

1988

1989

Now, of course, I knew when I wrote the letter that everything that the Comptroller puts his name to is a public document and that at some time or other it may be the subject of criticism or publication, positive or otherwise, and in that sense I

1990

knew that. I wasn't hiding this. On the contrary I knew when I wrote the letter to Nixon that Nixon himself might handle it in such a way that the letter itself would be the best evidence of the action which was taken and of the suggestions conveyed in it to him.

Now, there was no thought of any publication, except in the sense that any public officer, at least any Comptroller must have in regard to anything he signs his name to; and I probably signed on an average of at least one hundred such things a week,

1991

maybe two hundred, on an average, any one of which is subject to publication at any time, and which contain in summary fashion, as concisely as can be put the reasons for a given course of action, or the course of action suggested. So that in that sense, knowing that whatever I did was a public act in the sense that it might, at some time or other, early or remote, because I have had some of these things published a year and a half after the transaction, in that sense it was public property. Yet, there was no action taken on my part to give it any currency or publicity, because, as a matter

1992

of fact, that would have defeated the very purpose which I had in mind when I sent it to Nixon. This was a letter, in other words, for Nixon's own personal information and guidance, and from the very nature of it if it were prematurely disclosed it would tend to embarrass him in making any proper use of it.

Q. Now, I will ask you the question: Did you do any act which either immediately or later gave this paper out for publication?

Mr. Mathews: Same objection.

Mr. Caffey: And as calling for a conclusion.

1993

The Court: I will take it in view of the explanation of what is meant by publication.

A. I had nothing to do with the letter after I signed my name to it and gave it to the stenographer, about 10:40 A. M. that morning. When I did that I was through with it and had nothing further to do with it.

Q. And did you do anything further after that? A. No. I did nothing with it afterwards.

Q. Now, did you omit to do anything with regard to this paper which resulted in its publication? 1994

Mr. Mathews: I think that is objectionable.

The Court: Objection sustained.

Mr. Mooney: I except to that.

The Court: There is one question—I don't want to interrupt you—

Mr. Mooney: Your Honor might just as well ask it now, because I have got to my last question.

The Court: The only question which I would like to call attention to, so that there may be no misunderstanding is, in two places, perhaps in more, the letter uses the plural word "orders." For instance, in referring to the Judge in connection with the letter he says, "He not only denied the relief, but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor." 1995

1996

Just below that the sentence, "The orders of Judge Mayer denied to the Municipal authorities opportunity to ascertain the truth." Now, I would like to know whether the witness was referring there to just the order that has been discussed as to the refusal to appoint a co-receiver or whether he refers to other orders.

Mr. Mooney: Well, the injunctive part refers to other orders, and I will bring that out.

1997

The Court: Yes.

Q. There were served on you, as Comptroller, in connection with some tax sales, orders issuing from the United States District Court, which you had in mind as a foundation for this statement forbidding, mentioning the word "forbidding"? A. I had in mind the order to which you refer, which was an order of general restraint, and which was served upon me personally by a representative of Stimpson to prevent the sale of tax liens on these properties, the sales of which had been adjourned at some previous date to a date subsequent to the receivership, and I had in mind the other orders made in the other receiverships of a like character where a single receiver was appointed to the exclusion of any co-receiver of any kind.

1998

The Court: In other words—

A. I had in mind no specific order directed specifically to the Municipal authorities to restrain them and no others from making any particular application.

1999

Q. In other words, it was a general restraint order?

The Court: I think I can get it clear now. I assume that you refer to the order in each case appointing a receiver and carrying with it the restraining provision that you refer to.

A. Yes, there was more than one, as I recall it, such order, in some of these cases, if not all.

Q. You mean by that, one in each case? A. 2000
There was one in each case and I think there was more than one in some cases.

Q. But you had in mind, distinctly, one in each case? A. Yes. The ordinary order that is familiar to all equity, federal equity receiverships, of general restraint, restraining everybody from any interference of any kind with the receiverships, or any of their agents, subordinates, etc.

The Court: That developed what I had in mind. Those are the orders you had in mind?

2001

A. I had those orders in mind.

The Court: You say no particular order particularly restraining any Municipal authorities?

A. No, and I also had in mind that Mr. Nixon was a public officer of considerable experience and that he would probably understand if I didn't state what particular orders I referred to he would either inquire or obtain copies of them.

2002

The Court: That covers what I had in mind.

Q. I call your attention to this part of the letter— A. I want just to call your attention to one thing before you get any further. Nixon's own letter to me dated the 3rd of October, in which he solicits a personal conference and personal discussion, and if there was any question in his mind on the receipt of this letter as to any matter contained in it, I had a perfect right to assume that was

2003

embraced within the scope of the personal conference and personal discussion he urgently pressed upon me.

Q. And that he would seek you out and ask for a further expression upon the subject which he had initiated in this somewhat personal vein? A. Yes. You notice his letter of October 3rd, which is addressed, "My dear Mr. Comptroller," has a very personal touch to it. That vein runs through it, as though no one else had received a letter of this kind, and I don't know that any one else had received a letter of this kind, and I don't know that any one else had received it, as a matter of fact.

2004

And he has penned a postcript down at the foot with his own hand.

Q. Down at the foot? A. Yes.

Q. He identified that? A. He had previous, to that time, been at my office to discuss personally some of the companies that are now in the hands of a receiver, when he first became a public service commissioner. They were in the hands of a receiver at the time of his calling upon me to discuss the matter. I refer particularly to the Staten Island Company.

The Court: Those are receiverships outside of this Court?

2005

A. Those are receiverships in the Eastern District.

Q. Now, in one of the sentences in this letter— A. And I may say in addition to that that it was a common thing for Nixon to call me, or have me call him on the telephone for a brief conversation if anything required, of any moment, that was not the proper subject of a letter or that couldn't await a written communication.

Q. That is, in the performance of your several duties— A. In the course of official duties, yes. As I said this morning, there was nothing personal 2006
in our relations. They were all together official.

Q. Now, referring to this communication, the second paragraph thereof there is the expression "There must be a reversal of the policy for which Judge Mayer is responsible of denying," etc. Will you say that you meant by the expression "reversal of the policy for which Judge Mayer is responsible"? A. Well, I think, if I recall, if you will take that with something toward the end—if I may look at it just a moment.

Q. You are quite right. A. Where I made a specific suggestion to Nixon, for instance in the last 2007
paragraph, that "As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge Mayer putting the City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this," that is a refusal by these people who were seeking the conference that Nixon says was forced upon him— "A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure

2008

any advantage whatever to the traction interests." Does that answer your question?

Q. We have got to a certain point. I asked you with respect to this and you said that that is elucidated by the last part. Now, is it further elucidated by the expression just preceeding that, "that the responsibility," etc., "rests upon those who procured and are protected by such orders"? A. Yes. I should have read that in connection with the paragraph I read a moment ago; and in the light of well understood equity proceedure in the

2009

Federal Courts there are very few cases where a Federal Judge will refuse to grant an order to which all parties to the litigation make a request, for which they make a request.

Q. And that reversal of policy which you speak of was that a reversal of the policies by the parties and not by the Judge? A. Yes, it was the policy of the conduct of the receiverships, which they had shown, and which they were interested in the continuance of.

2010

The Court: If I understand it correctly then, it was not intended to convey the meaning that at any time the Judge referred to had in point of fact denied access to any particular papers, documents of sources of information except in connection with what you regarded as the results flowing from the refusal to appoint you in your official capacity as Receiver? A. That is correct.

The Court: So that it was not intended to convey to the public mind that the Judge had made any order, outside of the one you referred to, upon any application of the Comptroller or any other member of the

2011

Board of Estimate and Apportionment for access to anything?

A. In the first place, it was not intended to convey to the public mind, but only to the mind of Lewis Nixon, only to convey to the mind of Lewis Nixon, or to whom he might, by his own act, show the letter, that the orders referred to were the orders which in the very inception of the receivership, in my judgment, affectually excluded the City of New York from every kind of information that was indispensible, and which it should have in 2012
order to deal with these questions.

The Court: In other words, the letter was intended to refer to the order denying the motion for a co-receiver, together with the restraining orders to which you have referred?

A. Yes, and besides that there is a matter of history. In order to get into Nixon's mind the necessity, preceding any conference which he might desire to have of taking those steps that would put all the parties affected by the conference and who were required to be present, namely those representing the City of New York, on an equal footing. So that, whether the officials of the City of New York, including the Comptroller, might justly, or unjustly, feel that information had been withheld, that they might be put in a position to know that there was nothing that was being withheld that was of any consequence, nothing that they hadn't a complete understanding of. In other words the public officers might have had an exaggerated idea—I don't say they did have, but it is

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2014 conceivable that some of them might have had an exaggerated idea as to what such access and inquisition would have resulted in, but at any rate they would have had the assurance, after the inquisition that all that was to be known was known to them, and they could then act without any further hesitation or embarrassment.

Q. In answering these questions, particularly those addressed to you by the Court, where he referred to the nature of the order refusing to appoint a co-receiver, do you, in each instance, as
2015 heretofore, include as a concomitant of that order the continuance of the permanent receiver in the friendly proceeding and the retention by such receiver of some of the former officials of the railway. I mean, are those concomitant facts and circumstances to be taken in connection with the order denying the appointment of a co-receiver? A. Yes.

Q. I think it is quite plain already, but I shall ask you the categorical question: Whether by using the expression "reversal of the policy," used by you in this letter, you intended a reversal of
2016 policy by the Judge himself, or a reversal of policy by those who, as you stated in that letter, were responsible? A. I meant the reversal of policy by those who were responsible for the conduct of the receivership. And the reference to Judge Mayer serves to identify to the mind of Commissioner Nixon, the Court, and part of the Court where the order was made.

Q. And where the conferees might conveniently apply to carry out your suggested wishes. Is that it? A. Yes, I presume they could apply with permission to another Judge, to any other Judge, to any other Judge of the same Court at any rate.

2017

Q. It is perhaps wise to put in at this point, what others may not know. You understood at the time of the writing of this letter, did you not, that Judge Mayer was in charge of this receivership? A. I did.

Q. Now, in writing this letter, did you have any intention, whatever, of a contemptuous act toward Judge Mayer? A. Certainly not. Let me add, I had, as I said this morning, an intention, and the only intention I had was to get into the mind of Lewis Nixon a state of facts which he could verify at any stage from various sources, and which once 2018 he had in mind would impel him to follow out the suggestion I embodied in the letter; so that there could be freedom of discussion and a solution of these difficulties.

Q. Now, I will put the question impersonally: In writing this letter, did you have any intention to commit any contemptuous act toward the Court? A. I did not.

Q. Did you have any intention to charge any misconduct, ignominy or wrongful conduct of any kind or character toward Judge Mayer, or toward the Court? A. No. 2019

Q. Did you intend, by the writing of this letter to have any effect at all upon the orders or proceedings of the Court itself? A. Only in this sense: That I expected to have an effect upon the mind of Nixon. I expected Nixon thereupon to deliberate on whether, with, or without, a conference or discussion, he would carry the matter along with the various attorneys representing parties that were at this conference, with the view of making applications of the character suggested in the latter part of the letter.

2020

Q. Of a consent nature by the parties? A. Yes.

Q. And as a preliminary requisite to sitting down with the public officials of which you were one? A. Yes. Exactly.

Q. Well, my associate insists that I put this question to you. I thought I had done it already. I will ask you whether there was any intent, on your part, to affect or compel, or to influence the Court itself to reverse any order that it had made? A. I think I have answered that.

Q. I think so, too. A. If I haven't answered it,

2021 I will answer it.

Q. No, I think you have answered it.

Mr. Mooney: You may cross examine.

The Court: We will take a recess for two or three minutes.

Recess of five minutes.

After recess.

The Court: Gentlemen, we will resume.

2022

Cross Examination by Mr. Mathews:

Q. Mr. Craig, from your answers to Mr. Mooney's questions, I understand that you have been familiar from the time these receiverships were first created, that is, from the filing of the original bill, or a few days thereafter, with the so-called B. R. T. case, you have been familiar with all these proceedings? A. Well, I have kept informed about them, not from day to day, but I picked it up after six or eight or ten weeks, what had transpired in

2023

the meanwhile, if I haven't, I have endeavored to. I have had copies of the record up to a certain point. I am not certain that my files are absolutely complete.

Q. You mean the printed copies that have been supplied from time to time? A. Yes.

Q. Such as we have here in court? A. Yes, I think some of those are my copies, as a matter of fact.

Q. These blue volumes, B. R. T. Proceedings, and then the New York Railway Proceeding as rapidly as they were printed? A. Yes.

2024

Q. You knew of the pendency of the B. R. T. suit then and substantially of the proceedings therein on October 6th, 1919? A. Well, in a general way. I had been absent from the city from, I think, the 29th of July, until the 22nd of September, when I came back. From the 22nd of September to the 6th of October I was pretty well immersed in the making up of the Annual Budget for the City of New York for the year 1920. So that there was not much time to catch up during that period on this matter, so far as the detailed proceedings were concerned.

2025

Q. You had followed the newspapers, had you not, as to the general proceedings in the litigation? A. The fact is that I was in the wilds of Canada and I had given express directions not to let any newspapers or letters, telegrams or any other form of communication get to me, except in case of an extraordinary emergency, in which case a runner could get in the forest where I was. That emergency never arose. As a matter of fact from somewhere around, well, the early part of August until after the 20th of September, I did not have a newspaper to read.

2026 Q. On September the 22nd you returned to the city? A. Yes.

Q. Now, you recall distinctly, I take it, the preparation of the resolution of the Board of Estimate and Apportionment? A. Well, in a general way. Hundreds of matters have gone through my mind since then. Is there any particular point you may direct my attention specifically to?

Q. I believe you stated you prepared the resolution and cast your three votes for it? A. I am not so certain about casting the votes. I have a recol-
2027 lection, almost a certainty, I think, that I refrained from voting.

Q. You were present at the meeting at which it was adopted? A. Yes.

Q. And you were familiar with the proceedings at that time before the District Court? A. Well, in a general way. I wouldn't say that I had examined all of the records. Because, you see, the pressure of public business doesn't permit the reading of a record the day it comes in. It may lay there for three or four weeks before there is a moment to even turn to the title page.

2028 Q. You know that about that time, about January 15th, 1919, the New York State Public Service Commission for the First District had applied to this Court for leave to intervene in the B. R. T. suit in the name of and in behalf of the City? A. I knew an application of that character was made, yes. I may have misunderstood the time in your last question.

Q. Well, you knew that they had applied for the appointment of a co-receiver? A. Yes, I know an application of that kind had been made, but I did not regard that as a friendly application or one

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that would have served the interests of the Board of Estimate and Apportionment or the City of New York; whatever interest may have been served for the City of New York as represented by the Public Service Commission or whatever right they might have had to represent the City under special contracts of the B. R. T.

Q. As a matter of fact, the Corporation Counsel was given directions to oppose the action of the Public Service Commission in assuming to act for the City? A. Whatever directions were given to the Corporation Counsel were embodied in the 2030
resolution of the Board of Estimate and Apportionment.

Q. You knew then, that following that resolution, the Corporation Counsel did file an application for the appointment of you as co-receiver? A. I was so informed, yes.

Q. You knew that that came on for a hearing on or about January 15th, didn't you? A. Yes.

Q. And you knew that on the hearing the Court, in passing on the motion of the Public Service Commission and the application of the City presented by the Corporation Counsel, the Court had 2031
stated: "I do not for a moment foreclose the proposition that there may readily come in the course of this receivership a time when one or more receivers may be regarded as helpful and necessary to the Court. I can imagine that when the time comes to work out the financial future of this company, that the aid of a receiver representing at that time the united view of the public authorities, may be of great service, and I do not wish to be misunderstood as dealing with anything but the situation as it now stands upon this 15th day of January, 1919.

2032

"There may very well be a time—I repeat—when especially dealing with the financial situation, it may become extremely helpful and co-operative to have an additional receiver, but I do not see that that time is here at the moment. At this time what this receiver is concerned with is to get down to business as fast as it can. It has already started * * *.

"In the circumstances * * * I deny the motion for a co-receiver, without prejudice to its renewal at such time as counsel may be advised." A. I

2033 knew that the Judge's memoranda contained that and other statements.

Q. You knew that a few days after the Court entered a formal order containing this language, did you not? "The applications made herein on behalf of The City of New York and on behalf of The Public Service Commission for the First District of the State of New York for the appointment of an additional receiver or receivers herein are hereby denied without prejudice to the right to renew said applications or either of them at such time as counsel may be advised."

2034 "Decision upon the application of the Public Service Commission for the First District of the State of New York for leave to intervene as a party herein is hereby reversed.

"Notice of all subsequent proceedings herein, other than those relating to the ordinary current administration of the receivership shall be given to the solicitors for the following, namely:

The City of New York,

The Public Service Commission for the First District of the State of New York."

Q. You knew that, did you not? A. I knew that that was included in the action of the Court.

2035

Q. You knew, also, did you not, that the City had never renewed its application for the appointment of a co-receiver? A. I did.

Q. You knew that the City had never applied for leave to intervene in the B. R. T. proceeding? A. I did, except, with respect to that, I knew there had been a proceeding with respect to certain certificates, receiver's certificates, which, however, does not go to the main question.

Q. Don't you know that on that proposition, the receiver appeared specially and declined to intervene? A. You mean the City?

2036

Q. I mean the Corporation Counsel, for the City, merely filed an affidavit? A. I don't know what the detail steps taken were, but I knew he had no authority at any time to make an application to intervene or to appear generally after the order of January 15th was made.

Q. Nor was he ever requested to or given the authority by the Board of Estimate and Apportionment or by yourself? A. No.

Q. And you never, in any way, made any such application to the Court on behalf of the City? A. No, we had very good reasons for not so doing.

2037

Q. You knew, did you not, that the Corporation Counsel from time to time was being served with notice of the proceedings taking place before the Court? A. No, I did not know anything about that.

Q. You didn't have any reports of that at all? A. I had no knowledge or information about that except in a general way, a general sort of way. I assumed that from what I read in the newspapers that the Corporation Counsel was taking some proceeding, which I assumed were on his own account, because they were not on my account nor on the

2038 account of the Board of Estimate and Apportionment.

Q. Did you ever discuss with the Corporation Counsel this matter of whether or not he had notice of the proceedings, copies of the papers? A. No.

Q. You knew of the direction and the order requiring the papers to be served on the Corporation Counsel? A. I have answered that.

Q. You were advised, were you not, of the institution of the so-called New York Railways suit shortly after it was instituted? A. I was informed,

2039 if that is the sense in which you mean "advised."

Q. Yes. A. Yes, I had information of it.

Q. You had information of it? A. Yes.

Q. You knew that Job E. Hedges was appointed temporary receiver? A. Yes.

Q. And that later on he was made permanent receiver? A. Yes.

Q. And that he took possession of the properties and began to assume the jurisdiction and control of them as an officer of the Court? A. I knew he was reported to do that. Whether he did or not in fact I never had any particular information.

2040 Q. You knew that the Corporation Counsel had appeared before the Court in these proceedings, didn't you? A. Well, not any further than I stated a moment ago, when I understood your question to relate to all the receivership proceedings.

Q. You had the same information with respect to the New York Railways that you had with respect to the B. R. T.? A. I had the information I have testified to here a little while ago, such as I get from the newspapers, when I had a chance to read the newspapers in relation to those things.

Q. You knew, did you not, that the City of New York had never in fact applied to the Court for

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leave to intervene in the New York Railways suit? A. Yes.

Q. And that it never applied for the appointment of a co-receiver in that suit? A. Yes.

Q. And that no one on behalf of the City had ever made any such application? A. Yes, I knew that.

Q. You received information, did you not, concerning the institution of the bankruptcy proceedings against the Interborough Consolidated Corporation? A. Yes.

2042

Q. And you knew that Mr. Sheffield was appointed Receiver and subsequently elected Trustee? A. Yes.

Q. You knew, did you not, that the City of New York had never appeared in that proceeding? A. I knew that no appearance was ever authorized.

Q. And that no relief had been asked for on behalf of the City? A. I know that no relief was ever authorized to be asked for on behalf of the City.

Q. And that is true with respect to all three proceedings with the exception of the application for the appointment of a co-receiver in the B. R. T. matter? A. And the question involved in the issuance of Receiver's Certificates by the B. R. T.

2043

Q. You received information, did you not, concerning the memorandum of Judge Mayer, dated Septembr 6th, 1919, on the Stone & Webster report? A. I was absent from the City then. I don't remember having had that called to my attention.

Q. I show you a copy of the memorandum I have referred to, which is Government's Exhibit No. 26, and ask you to look at it and see if you cannot refresh your recollection with respect to the infor-

2044 mation concerning this (hands paper to witness)? A. Now, what is your question?

Q. Did you not have information concerning the memorandum of Judge Mayer of September 6th, 1919? A. I think I did, but I won't say at what time. I certainly didn't have it any time in the month of September, 1919.

Q. Did you have information concerning this memorandum prior to the writing of the letter of October 6th? A. My best recollection would be that I did not.

2045 Q. That you did not? A. Yes.

Q. Can you state when this was first brought to your attention? A. My impression is it was some time afterwards as the result of a conversation with somebody, that I had somebody get me some copies of it. I think it was quite a while afterwards, as much as two or three months afterwards.

Q. Who was the sombody to whom you refer? A. Well, some subordinate in the office. I don't remember at the moment who it was.

Q. Did you look into your own files to see if you had a copy? A. I did not personally look into the files.

2046 Q. Did you have your files examined? A. Very likely.

Q. Did you find a copy there? A. My recollection is that there was a copy found there.

Q. That there was a copy found in your files? A. Yes, at a subsequent time.

Q. What occasioned the examination to see whether you had a copy of this memorandum? A. Oh, whenever we have what is known as a "live file," for the purpose—which is the subject of constant re-examination to see that nothing escapes attention. Papers may lie in the file for a week

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or a month or six weeks, but there comes an interval of some time that requires that file to be taken out and re-examined, to see if there is anything which has developed that requires any action at that time. The work is divided in different ways. We have one file called the "daily turn-over stuff," which has to be examined daily; although there may be papers that have been there for months to see whether the day has brought forth anything that will facilitate the solution of that matter.

Q. When you wrote this letter of October 6th, did you make an examination of this "daily turn-over" 2048
file, or of any other records to see what proceedings or records and information you had concerning these proceedings? A. That couldn't be in the "daily turn-over" file to begin with. In any event, when I wrote this letter of October 6th, I did not make any examination of any file on October 6th.

The Court: What was the day you returned from Canada?

A. September 22nd.

Q. Then, when you wrote this letter of October 2049
6th you wrote it without making any inquiries as to what had happened between the time you went on your vacation and the time you dictated the letter? A. I wrote it with my knowledge of the facts which were pertinent to the letter and in the light of the information that I had.

Q. Have you read Government's Exhibit No. 26 since you wrote that letter? A. I don't know it by that number.

Q. I am speaking now of Judge Mayer's memorandum. Let me ask you now specifically: Have

2050 you read that portion of Government's Exhibit 26? A. Yes, I have read the Judge's memorandum—

Q. (Continued)—in which the Judge says—"in order that the gravity of the situation may be generally made known, and that some appropriate action may be taken as speedily as is consistent with full information, the receivers are instructed to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal authorities and to Civic and Taxpayers' Association of the Greater City. At the same time
2051 the receivers will make it clear that every facility will be afforded, both to the public officials and Citizens' Associations to satisfy themselves in respect to the actual financial and other conditions existing in relation to the corporation now in their official charge"? A. I have read that.

Q. You had read that when you wrote the letter? A. Well, I won't be certain whether I had, but my impression is that I had.

Q. That you had, on October 6th? A. Yes.

Q. And your impression is, when you wrote that letter you had that in mind, in the same way you
2052 had these other matters in mind, about which Mr. Mooney has interrogated you? A. Yes.

By the Court:

Q. Do you recall whether you read the letter of transmittal, signed by Messrs. Garrison, Hedges & Sheffield, which, in effect, repeated the clause to which Mr. Mathews has just referred? A. Well, I wouldn't be certain as to that. I am willing to assume that I did. In other words, I do not want to evade any question of responsibility for having read it. My recollection is that this memorandum,

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the first copy that came to my attention, did not come from the office files, and that when this search was made, it developed a communication of this kind in the files, but my recollection is that they were not attached, but they may have been.

By Mr. Mathews:

Q. Have you got that copy available? A. It can be dug out, I guess.

Q. The letter of transmittal, signed by the Receiver for the B. R. T., and the Receiver for the New 2054
York Railways Company, and the Trustee of the Interborough Consolidated Corporation states, "We desire to state that every facility will be afforded to you to satisfy yourself in respect of the actual financial and other conditions existing in relation to the corporations now in our official charge." Is it your impression that you had read that— A. Yes. It is—

Q. —Before you dictated the letter of October 6th? A. Well, my impression is that I had not read it before, but it would not have made any difference with respect to that letter, if that is what 2055
you want to get at.

Q. I want to get at the fact. A. My best recollection is that I had not read it at the time that the letter was sent, but that it did not affect the subject matter of the letter.

Q. But you had read that portion of Judge Mayer's memorandum, and I assume all of it, prior to October 6th? A. I think so. I may say that does not affect the subject matter of the letter. The kind of information that would be furnished in that way would be of no value whatever to the muni-

2056 cipal authorities in discharging their responsibilities in this matter.

Q. I understand your testimony, in answer to Mr. Mooney's questions that the matters in your mind when you wrote this letter, were principally matters relating to the former traction difficulties in this city. That is true, isn't it? A. I think you misunderstood that. They relate to existing conditions, the conditions existing on October 6th, 1919, and prior thereto with respect to the transportation facilities in the City of New York as dis-
2057 closed in a fragmentary fashion from time to time by the matters to which Mr. Mooney referred and by general knowledge of that subject with which I had been in contact for a great many years.

Q. What effort had you made in the B. R. T. matter to procure access to original sources of information after the Receiver was appointed? A. My efforts ended when the order was made excluding any representation in the Receivership by the City of New York.

Q. You mean— A. Except as—

Q. You mean that the application for the ap-
2058 pointment of yourself, as receiver, was the only effort that was ever made by you for access to original sources of information in the B. R. T. receivership? A. I think that is a fair way to state it. Yes, because that matter was effectually disposed of in that proceeding and nothing short of that kind of relief would have given the municipal authorities any access to the kind of information that is indispensable that they should have to deal with these questions.

Q. Although you knew that the Court in denying that application had expressly reserved to you the

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right to renew it at any time? A. Yes, but I knew that in two subsequent matters a single receiver had been appointed at the instance of the same, very largely the same interests, so that that question had been twice subsequently really determined.

Q. Had you made or was there made at your instance or otherwise any application in the two subsequent matters for the appointment or co-receiver? A. I have answered that.

The Court: He said no before.

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Q. You assumed, then, that because the Court appointed only one receiver in the New York Railways matter, and only one receiver in the bankruptcy matter, that it would be futile to apply to the Court for the appointment of a co-receiver in those matters and, therefore, you took no action in that matter? A. I assumed, and I supposed the other members of the Board of Estimate and Apportionment assumed also, that the method of conducting those receiverships was established with the major receivership, the one that first came into court, and that it would be entirely futile, until some action was taken by those who were instrumental in the carrying into effect of that policy to attempt to change it, for the municipal authorities to do anything further in that direction. For it was well known throughout that our views were opposed by all the parties in interest on the other side, and that we could not hope to get anywhere as long as we were left high and dry on the side lines, as it were. It was a matter to come entirely from the other side.

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Q. So, instead of applying for relief, or renewing your application through the only channel from

2062 which you thought you could get relief, you did nothing? A. We did not think we could get relief. Nobody on the other side who was instrumental in procuring the entry of it, had taken any steps at all. We were confronted by an order that nobody interested in the receivership had taken any steps to have modified, or supplemented, in any fashion, and we understood it was perfectly futile to take any steps in that direction as long as that opposition continued.

Q. When you refer to opposition, I wish you
2063 would state exactly what you mean. A. I mean the opposition of the plaintiff and the defendant, and their respective counsel in the receivership, and the subsidiary companies. I guess they are all defendants.

Q. And of the security holders? A. The parties, the parties—those who were parties in the receivership.

Q. Did you understand that there was any opposition on the part of the Court as distinguished form the parties to the litigation? A. I understood that the action of the Court represented the desire
2064 of the parties.

Q. And that the Court was arrayed with them in opposition to the City? A. No. That the Court, like any other court, would enter almost any kind of an order that the parties agreed upon, or consented to. It is the commonest kind of thing for consent orders to be signed without even an examination by a Judge of a court. That applies not only to Federal Courts, but to almost all courts that I have had experience with.

Q. Well, as a lawyer, and as the representative of interests which you have described as being very important, particularly after the expression of the

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Court, in denying the original application, reserving the right to renew it, didn't you think, as a lawyer, that you should, if you felt aggrieved at the action of the Court, take advantage of the permission to renew and renew your application for the appointment of a co-receiver? A. In the first place, I wasn't thinking as a lawyer. I was thinking as the Comptroller of the City of New York. In the next place, I think I have covered it fully as to the other part. I think I have fully answered it. If I haven't I will make such further answer as you desire.

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Q. No. I want you to answer the question. A. I will go over it again. We made and presented, with all the force we had at our command, the necessity for representation by the City, or in behalf of the City, in the receivership when the matter first one came along. That was opposed by the parties in the receiverships. The City was not a party. It had no right to be heard. It could not even appeal from the order made by the Court denying the application, even if the order had not contained a reservation of the right to renew. So the City had no rights in the premises whatever, and whatever presentation had been made, they had all the facts lying here in the record that they would have had by reiteration; and all the parties on the other side understood—and if they didn't understand, it was brought effectually to their minds, to their attention, and to the mind of Commissioner Lewis Nixon by the letter I sent to him on the 6th of October. In other words, only a party could apply to modify an order in the action or in the course of the proceeding. A stranger could not do it, and the City had to be careful, moreover, that it didn't do something, that by some in

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2068 advertance or otherwise, that might be construed in making it a party to the cause.

Now, the City is not subject to the orders made in the course of these receiverships, because it is not a party, that is, except in the sense that they are orders of restraint against the whole world, but the property rights of the City of New York are not affected by the orders made in the actions, because it is not a party. We were anxious to avoid any situation by which it might ever be held, by any court, that we had, by inadvertance or other-
2069 wise, subjected the City of New York to the jurisdiction of the receivers.

Q. It was your impression, then, that the City had no right in the first instance to apply for the appointment of a co-receiver. Is that right? A. Well, they had a right in the sense that they could present the matter to the Court. But, as a party, they could not do that.

Q. And they had the same right to renew that application, didn't they? A. Well, I suppose they had as much right to renew it as they had to take it in the first instance, except that, in the legal
2070 sense, the right to renew only ran to parties; and the City, by any attempt to renew in that way, might have brought about the very condition I have just referred to.

Q. You say that you knew that the orders of the Court could not bind the City in any sense? A. No. I didn't say that.

Q. I misunderstood you then. A. I didn't say anything about that. I said the City was not a party and its property rights could not be affected by the orders made in the course of the receivership to which it was not a party, except in such a way as the order ran against

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the whole world, an order of restraint, or injunction would affect the City as it would affect anybody else.

Q. These orders were merely the usual orders that require operation on the part of the Receiver, are they not? A. I would not say whether they were usual or unusual. They are orders that are frequently seen in the course of Federal equity receiverships.

Q. You say they are unusual? A. I said I wouldn't say that they are usual or unusual. I have had a large experience with orders in Federal 2072
equity receiverships and my experience is that they differ in very material respects from time to time, so that I haven't compared these with other orders to see if there is any material departure from any of them.

Q. You had in mind something very definite and specific when—did you not—when you said the orders of the Court "had stood between the City and the truth"? A. Yes.

Q. I wish you would specify just the particular order or orders you had in mind? A. I had in mind in particular the order which expressly excluded 2073
the City from any representation in the said receivership and which, at the same time, as a part of the same order, appointed a single receiver; and the orders following that, in form and in substance, in the succeeding cases appointing a single receiver, and the provisions contained in those orders excluding interferences, etc. But the whole thing is this: That the only effectual method of getting first hand information in regard to these matters, is access, with power to compel the production of any kind of document, or evidence, or record that may be under the control of the company, or its

2074 employees; and a mere outsider, being regarded as a guest, as it were, hasn't any such power. So that when you eliminate the only functionary who can do that in a receivership,—when you eliminate him, you close the door to everybody except the single receiver who remains in charge. Now, if I haven't made that plain I will state it over for you in as many ways as you would like to have it.

Q. The Receiver is always subject to the immediate direction and control of the Court, is he not? A. Yes, on application.

2075 Q. And always subject to removal? A. Yes, on application of the parties ordinarily.

Q. Always subject to removal by the Court? A. On application of the parties, ordinarily.

Q. And on application of anybody else for misconduct, is he not? A. I don't know of any case where a Receiver has ever been removed on application other than the application of a party.

Q. You know it practically resides in the Court to remove a Receiver on its own motion on the ground of misconduct? A. I suppose the Court could remove him of its own motion without any

2076 ground whatsoever?

Q. And the Court is always supposed—the Court is always open to complaints, or charges, against its own officers, is it not? A. From proper parties, yes, sir.

Q. And if there has been any misconduct on the part of its receivers, or anyone representing them, for which they were responsible, that matter could be brought to the attention of the Court? A. I assume that it could. Whether it could be done with effect or not, is a different question.

Q. As a matter of fact— A. Depending upon

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in whose possession the control of the evidence might be.

Q. As a matter of fact, you know that no such charge was ever preferred against any of the officers or their subordinates in any of these proceedings? A. I think that is the fact.

Q. Except such charges as are contained in your letter of October 6th? A. Well, I don't think there are any charges in that letter against any of the officers or subordinates. If you find any such, anything of that kind, I would be glad to have you bring it to my attention.

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Q. In this letter you say, "There must be a reversal of the policy for which Judge Mayer, is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources," etc. I wish you would tell me just what you had in mind when you wrote that sentence? A. I think that is elucidated in the last two paragraphs of the letter. I had in mind, what I said before, and what is shown in the last part of the letter, that the impounding of all of the evidence in the hands of a single receiver and excluding from the receivership any representation on the part of the public authorities effectually closed the door to the public authorities and left them where they could proceed only by sufference of the receiver, and by consent of the other parties.

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Q. You say, "the door was closed." Did you ever make any effort to get in that door? A. We made a very vigorous effort, when we directed the Corporation Counsel to apply for a receiver. You could never do anything but bring facts to the attention of the Court. I could not state the proposition in any other way than I have already. That application was denied, and it was not only denied

2080 on behalf of the City, but an application of the same general tenor was denied when it was made by the Public Service Commission in behalf of the City. So, that in principle, it was twice denied at the instance of those who were parties to a consent receivership.

Q. That was denied at the same time, at the same moment and in the same order? A. Yes.

Q. Now, neither party, neither the Public Service Commission nor the City ever renewed that? A. I think I have answered that twice, but I will
2081 answer it again. The City never did. So far as the Public Service Commission is concerned, I have no information that they ever did.

Q. When you say, Judge Mayer refused to grant any of the relief sought by the City, you mean, I suppose, that particular relief applied for in the one proceeding, the B. R. T. Proceeding, when a co-receiver was asked for? A. I meant that application, yes, and the consequences that followed from it.

Q. Did you mean any other application? A. I meant that particular one and the consequences
2082 that followed from it, and no others.

Q. In your letter you say, "He not only denied the relief, but he made orders which preclude any application being made by the municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking municipal aid and favor." What orders did you refer to there? A. I referred to the orders of restraint, that apprised Nixon sufficiently of what the situation was, and if he had had any doubt as to what the situation was he could have inquired.

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Q. Mr. Nixon could inquire? A. Yes. You may not have in mind that Nixon was not Public Service Commissioner at the time that these receiverships were instituted.

Q. He was appointed when? A. He was appointed sometime in the month of June, I think, 1919.

Q. This letter, then, was intended to educate Mr. Nixon in matters that had transpired in the receivership before his appointment? A. In material aspects, yes.

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Q. So you refer to no other orders than those you have already generally mentioned? A. Yes, and the other orders for a single receivership, made in the other receiverships, I have already referred to.

Q. In the next paragraph, you say, "The orders of Judge Mayer deny to the municipal authorities the opportunity to ascertain the truth." Now, to what orders do you refer there? A. The same orders.

Q. The same orders. Any others? A. I had no other orders particularly in mind.

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Q. Tell me what effort the municipal authorities made to ascertain the truth? A. They made the effort for equal representation in the receiverships and for access to the original sources. Being denied that, they regarded any other kind of information, no matter who might furnish it, as of no completeness or reliability, that is, reliability in the sense that it did not cover the whole field.

Q. I understand, then, that the only effort that was ever made to ascertain the truth was the application made for the appointment of a co-receiver? A. I think this is the fifth time I have answered that, but I will answer it again.

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The Court: Yes, it has been frequently answered.

A. If the suggestion in the letter to Commissioner Nixon had been followed out, it would have all been cleared up and opened up.

Q. Now, you, I believe, said that you and Mr. Nixon frequently, where there was not sufficient time for correspondence to pass between you, discussed various matters over the telephone? A. Not quite as broad as that. I said, or meant
2087 to say, that frequently there were conversations over the telephone between myself and Mr. Nixon about matters which required to be disposed of and which did not need the formality of a letter, or which could not wait for a written communication.

Q. And you had often seen him? A. I did not mean to create the impression that it was an habitual matter, or that these were conferences in the sense that you use the term.

Q. You had seen Mr. Nixon personally a number of times after you returned from Canada? A. As
2088 a matter of fact, I don't think I had seen him after I returned from Canada, prior to the 6th of October.

Q. Hadn't you seen him prior to the Wednesday conference—I think it was on the first day of October? A. I think not.

Q. You hadn't seen him at all then after the 22nd of October? A. September, you mean?

Q. September. A. That is my recollection.

Q. Had you talked to him over the telephone after the 22nd of September? A. I think it is quite likely. I am just trying to fix the date of one conference I had with Nixon, and I am not certain

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whether it was before I went away at the end of July or immediately after my return after the 22nd of September. My impression is it was in July. It may have been in September.

Q. You received Mr. Nixon's letter of October 1st—I think that is Government's Exhibit 1—on October 2nd, did you? A. It was received in my office on that date.

Q. And you were at your office on that day? A. Yes, but that does not mean that it came to my personal attention, as I can illustrate right now. Matters received at my office, since I have been here at 10:30 this morning bear the time stamp as of today, but they will not be seen by me today, for obvious reasons.

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Q. When did you first see this letter?

The Court: He said October the 6th, I think.

Mr. Mathews: That was the other letter.

The Court: Oh, that was the other letter?

Mr. Mathews: Yes.

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A. My impression is, that I saw it on the 3rd—on the 4th.

The Court: Saturday?

A. Yes, Saturday.

Q. You knew then, didn't you, that you had an engagement for 10:30 Monday morning? A. Certainly I knew it.

Q. That telephone service during the day following the 2nd was all right, and you could have telephoned Mr. Nixon, couldn't you? A. Now—

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Q. Will you answer the question? A. It is an unfair question. I don't think you understand the situation, or you wouldn't ask it in that way. In the first place, it is my recollection, that this letter did not come to my personal attention until sometime Saturday. Now then, on Saturday it might have come to my attention after twelve o'clock, at which time the Public Service Commission is supposed to have closed and its telephone service is cut off a very few minutes after twelve, and there would have been no operator, even if I

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had the intention of telephoning, I would not have had the facility, but probably I had no intention of telephoning.

Q. Is it your recollection then, that this letter was not received until Saturday? A. My recollection is that it did not come to me, personally, until Saturday.

Q. Did you know anything about the existence of that invitation to that conference before Saturday? A. I cannot say that I did.

Q. Is it your recollection that you didn't know it until this letter came to your attention? A.

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That is my recollection.

Q. And although the letter was received in your office, according to the date stamped on it, apparently at 10:30 in the morning of October 2nd, 1919, your recollection is that you did not see the letter or have any information concerning it until Saturday? A. That is my recollection and I can give you the reason why that would be the case, if you desire it.

Q. Yes, I assume you were busy with the Budget Committee all that week? A. We had public meetings. The Board of Estimate meets on Friday,

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which was the 3rd of October, and the Sinking Fund Committee meets on Thursday, which is the 2nd of October, and those two meetings occupy several hours of a day and there are matters preceding them that must be gotten in shape for disposition at the meetings. Then there is always a flood of matters which have accumulated during the day that are of an emergency character, that must be disposed of the first moment I return after the meeting, and that condition would suffice to exclude this kind of a letter from being read on those days.

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Q. The traction situation, at that time, was considered by you as somewhat critical, wasn't it? A. It was in bad shape. There is no doubt about that.

Q. You knew, didn't you, that some of the lines making up the so-called Green car system, were disintegrating, were about to disintegrate? A. I knew there had been going on disintegration from 1903.

Q. And that the storage battery lines had shortly been stopped? A. I am not sure as to that I knew that at that particular time. I haven't any recollection of that specific line.

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Q. Haven't you a recollection that at about that time the public press was carrying large headlines of the traction situation and the differences between the various persons interested and the public? A. I knew that headlines were being carried, and now that you remind me, of another thing: That the Second Avenue line had been on the rocks and in the hands of a receiver for eleven years, so the question of a surface line going wrong and coming to a point where it could not make any money for

2098 security holders was not anything new or novel, but on the contrary was one of the inevitable consequences of the establishment of a rapid transit system for the City of New York which practically paralleled all of those surface lines for their entire length, or a greater part of their length, with local and express service, in the same streets in most instances, and anybody with an ounce of intelligence knew that the inevitable consequence of that would be the extinction of the surface lines sooner or later.

2099 Q. You do not recall though, that on October 6th, or a few days prior thereto, some considerable time prior thereto, in fact, that at that time there was considerable public concern and excitement over the traction situation? A. I have a very distinct recollection that there was public concern and excitement for a very considerable period anterior to that, at that time, and subsequently. There is no question about that.

Q. There is no doubt that the excitement at that time was at avery high pitch? A. I don't know how high the pitch would be, but, unquestionably

2100 it existed very extensively. That was one of the things that I expressly directed Commissioner Nixon's attention to in the letter I sent him on that day.

Q. You had discussed the traction situation with your friends and other people, hadn't you? A. I had discussed it with a great many people, some friends, and some not.

Q. And you were, at that time, pretty thoroughly in touch with the whole situation, weren't you? A. I had been in touch with it for a great many years, even before I became Comptroller.

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Q. And especially so at that time? A. Well, I was in touch with it as soon as one could get in touch with it after coming back from a vacation in the country, I think I may say I was in more intimate touch with it than any other public official in the City or State of New York, if that helps you to get an answer to your question, and that is the fact.

Q. What time did you get to your office on October 6th? A. About 9:30. Before 9:30 I am usually there.

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Q. You said it was about 10 o'clock when you dictated this letter? A. Between 10 and 10:30.

Q. And you dictated it to Mr. Van Valkenburg without having him submit a draft to you? A. Yes.

Q. And before it had been written out you had gone into the room of the Budget Committee where the Budget Committee was sitting? A. Yes.

Q. Do you recall, independently, who the persons were who were present that day? A. At that meeting?

Q. Yes. A. Well, I could refresh my recollection. There is a record kept of the attendance.

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The Court: Have you got that record?

Mr. Mathews: I think I have it here. That was marked for identification and never offered in evidence.

The Court: Show it to the witness.

Mr. Mathews: I think the attendance is the evidence from one of the witnesses.

Q. Do you recall that the Mayor was there? A. Yes.

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Q. Mr. Michael F. Loughman, President of the Borough of Manhattan? A. Yes.

Q. Mr. Edward Riegelmann, President of the Borough of Brooklyn? A. I am not so certain that Mr. Riegelmann was there at 10:30. The attendance may have been made up. If a member were late his appearance may have been entered after he came in.

Q. Mr. William J. Flynn, representing the Borough of the Bronx? A. Yes, Flynn was there.

Q. Maurice E. Connolly? A. Connolly was
2105 there, yes.

Q. President of the Borough of Queens? A. Yes, he was there.

Q. Frank X. Sullivan, representing Queens? A. I do not recall whether Sullivan was there present at that time. He may have been present somewhat later in the morning.

Q. John F. Bowe, President of Richmond Borough? A. Yes, Bowe was present.

Q. You presided? A. Yes.

Q. How long after you entered the conference room or the committee room was it that Mr. Van
2106 Valkenburg brought the letter in to you? A. Within less than fifteen minutes.

Q. Do you recall what business was transacted before he came in? A. I do not know that I could state specifically as to what was transacted before he came in, because there are a number of matters under consideration at the same time. We may hold an item for ten minutes while an examination is being made in order to obtain additional information, and while that is being done we can dispose of half a dozen others.

Q. Do you have a stenographer present at the sessions of the Budget Committee? A. Yes.

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Q. Was one present on that day? A. Yes.

Mr. Mooney: I think the stenographer was examined as a Government's witness.

Mr. Mathews: He was.

Q. Now, I show you Government's Exhibit 14 for identification, and ask you if it is not a fact that the letter was read before any business, whatever. was transacted? A. No, it is not a fact.

Q. And before the stenographer came in? A. No, it is not a fact.

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Q. Was the stenographer there when that letter was read? A. Yes, sir.

Q. You are certain of that? A. Yes, sir, quite certain.

The Court: Such a communication would not be a part of the official record anyway.

A. No, and I think probably you may be mislead. The stenographer does not take everything that transpires.

Q. Let me see if I have what the stenographer's duties generally are in there: He goes in there and takes such notes as he thinks proper to make, giving a general outline of the proceedings, but then when definite action is taken by the Committee, it is dictated to him and he makes a note of that, and that is the official minute of the proceeding with respect to the action of the Committee, isn't it? A. Not exactly. The stenographer takes in his own way the record of the action. Now, if there is discussion upon a subject, where there seems to be a difference of opinion, or if anybody is heard, there is a hearing, why then he is presumed to take the

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2110 entire discussion, particularly of the hearing, and if a subject, without anybody applying for a hearing, develops a marked difference of opinion in the Board, the discussion is taken, but an ordinary discussion which results in no difference of opinion is not taken; and he takes the result when it is agreed upon and sometimes with supplemental suggestion or condition added.

Then there is what you might call in newspaper parlance, "the boil down," which is a mere summary of the results. That is prepared for immediate dis-
2111 tribution among the members of the Committee on the following morning. But the detailed discussion and the detailed items are not written up by the stenographer sometimes until some time afterwards.

Q. What does the stenographer's minutes show for that day? A. You mean this calendar you have?

Q. Yes, October 6th. A. I saw it some time ago, not so lately.

Q. I don't mean the copy I have. The more extended minutes? A. I saw it about a month ago.

Q. Don't you recall that there is no reference in
2112 that copy of the extended minutes to the letter? A. I know there is none. There wouldn't ordinarily be any. It is not an item of the Budget or anything that goes into the Budget.

Q. It had nothing to do with the business of the Committee? A. It is not an item in the Budget or that could ever get into the Budget.

Q. It is something with which the Budget's Committee had nothing to do as such? A. As a Committee, but concerned the members of the Board of Estimate and Apportionment who happened to be there in different capacities as committeemen.

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Q. You say the original letter was handed to you and a sheet remained in Mr. Van Valkenburg's hand, and you asked him to read it, which he did. Now, after he read it you say there was some discussion lasting about two minutes? A. Not more than that.

Q. Will you tell me what the discussion was? What did the Mayor say, for instance? Let us take them up, one by one. Do you recall what he said? A. I don't recall the particular words the Mayor used. But, it was to the effect that it was a good letter to send Nixon.

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Q. What else did he say? A. I don't recall anything in particular.

Q. Do you recall that the Mayor said that such a letter, in his opinion, would be in contempt of court? A. The Mayor didn't say any such a thing.

Q. Did any one present make any such statement? A. No one present made any such statement.

Q. Can you recall anything further that the Mayor did say? A. Further than what?

Q. What is that? A. Further than what?

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Q. Than what you have already indicated, that it was a good letter? A. That was the concensus of opinion. You will bear in mind the tenor and purpose of this letter was to get the municipal authorities, that is, the Board of Estimate and Apportionment and the Comptroller on the same footing as to information that they had sought to get on when the receivership was first instituted and the whole tenor and purpose of the letter to Nixon was to that effect. Because of that, and because they were not afforded access, it was a matter that should be brought to their attention to see whether or not there was any dissent in the Board.

2116 There was not. On the contrary there was a general chorus, I might say, of approval.

Q. Did you say anything further than you have already indicated? A. Nothing further than I have already indicated other than the direction I gave to Mr. VanValkenburg to transmit it.

Q. Did any one say, in substance, that the letter, if sent, would constitute contempt of court? A. No one did.

Q. Did any one say that in substance? A. No one said it in substance or in any manner, shape or
2117 form, or implied it or suggested it, or inferred it.

Q. That applies to each of those who were present at that meeting, namely, Mr. Loughman, Mr. Riegelmann, Mr. Connolly, Mr. Sullivan and Mr. Bowe? A. That applies to each and every one who was present?

Q. Do you recall any specific thing said by any particular member of the Board—do you recall, for instance, what Mr. Loughman said, if anything? A. At the moment I do not believe I can.

Q. Or what Mr. Riegelmann said, if he was present? A. I am not certain that Riegelmann was
2118 present at that time.

Q. Or Mr. Flinn? A. No more than a general expression of approval. Anyhow, not the particular words that were used. I did not charge my memory with that. I was busy signing the letter and I was listening with my ears, and signing with my hand, and looking with my eyes.

Q. Do you recall what Mr. Connolly said? A. Not particularly., Connolly usually makes some fly remark of some kind, but I don't know what kind of fly remark he made that day, if any.

Q. Did he say anything about the letter being in contempt of court? A. No.

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Q. Did any one else say that the same thing had been running through his head? A. What do you mean by the same thing?

Q. I am referring back to the contempt of court matter. A. No. I have answered that four or five times. I will answer it as many more as you wish, but I can't make it any clearer than I have.

Q. Do you recall anything Mr. Sullivan said? A. I am not certain that Sullivan was present. My impression would be to the contrary.

Q. Do you recall whether Mr. Bowe made any remark— A. Sullivan and Connolly are there as 2120
associates, you know. One is a substitute for the other.

Q. I notice in this that Queens is represented twice— A. The two representations only gives them one vote.

Q. I guess that applies to the vote on the letter as well as to other matters. Do you recall anything that Mr. Bowe said? A. No. not in particular.

Q. I understand that no further reference was made to the letter in your presence, or by you, or by any person until the luncheon hour? A. That 2121
is correct.

Q. Do you recall seeing Mr. Kerrigan that morning at all before you went to lunch? A. No.

Q. Do you recall that you didn't see him, or that you cannot recall seeing him? A. My impression is that I did not see him.

Q. The stenographer testified that the Committee adjourned at about 1:25 for lunch. Does that conform to your recollection? A. Somewhere along there.

Q. And resumed at 2:30? A. I think that may

2122 be recorded in the minutes. A thing of that kind ordinarily would be.

Q. It is marked in pencil at the top of the minutes, and the stenographer testified that that was made about that time. A. That is correct, about.

Q. Do you recall going to lunch with Mr. Kerrigan? A. Yes.

Q. When was it he first spoke to you, or you first spoke to him about that letter? A. On the way to lunch.

2123 Q. As you were leaving the building? A. Well, we were leaving the building from the moment the door opens in the Committee room. We were then in the public corridor.

Q. What I am trying to get at is: Was it almost immediately after you joined him, or was it later? A. It only takes five or six minutes to get from the door of the committee room to Haan's restaurant, if you walk along, so that it might have been anywhere along there. Whether it was mentioned when we were in the corridor or before we got into the elevator, or in the elevator, or on the street, I

2124 cannot tax my memory to state. Because he had a great many things to look after, and so did I, and often times at those adjournment questions have come up, or are brought up.

Q. What did he say to you about the letter, or what did you say to him? A. I do not think I said anything to him at all.

Q. What did he say to you? A. He referred to the fact that there had been a request there for the letter from the reporters, and that he had furnished copies to them.

Q. What else was said? A. I don't recall, at the

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moment. If you can suggest anything to me as a reminder it might refresh my recollection.

Q. What did you say to him, if you recall? A. I don't think I said very much. There is not much left of me to talk after I have been in session with that Finance and Budget Committee for four hours and appropriated a hundred and twenty-five million dollars of public money. I am ready then for other people to do the talking.

Q. Then I take it that it was about one thirty that Mr. Kerrigan reported to you that he had given copies to the newspapers? A. It was later than 2126
that. You say, yourself, the Committee didn't adjourn until 1:35.

Q. 1:25. A. Was it 1:25?

Q. Yes. A. The process of getting out of the room will take from five to eight minutes. Somebody always stops the Comptroller and gets between him and the door to hold him up on something so I cannot get out, so I did not get out of there—

Q. It was before you sat down to lunch, anyway? A. Yes.

Q. Then you had lunch and immediately went 2127
back to your office? A. Yes.

Q. After lunch? A. Yes.

Q. Was anything further said about it at lunch or after lunch? A. I don't recall anything further in particular.

Q. Do you recall anything further that you said to Mr. Kerrigan? A. I think I may have told him that Commissioner Delaney had called me up at the meeting and had told me that Nixon had read that letter over there.

Q. Had Commissioner Delany called you up? A. Yes.

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Q. What did you say to Commissioner Delany, and what did he say to you? A. He told me that Nixon had read that letter over there to the crowd of railroad attorneys that he had received from me, and that there was a good deal of feeling provoked by it, and that the conference had been adjourned.

Q. What time was that? A. I should say about 11:30.

Q. Where were you when you got that telephone message? A. I was presiding as Chairman of the Committee on Finance and Budget.

2129 Q. Did you leave your seat to answer the telephone? A. No, the telephone is right at my hand.

Q. What did you say then to Mr. Delany about it? A. I didn't say anything. I said yes. thanks, good-bye.

Q. Is that all you said? A. Yes.

Q. And that is all he said to you? A. No. I told you in substance what he said to me.

Q. I mean, what you have already stated. There is nothing further he said to you? A. Nothing in substance.

Q. He told you, didn't he, that the meeting up
2130 there was a closed session when the letter was read? A. No. I don't think he told me that. He knew I was in a Committee, and knew I was there when I had this conversation, and he made his conversation as short as he could. It was just a thing which I suppose he thought I ought to know. I thanked him and said, good-bye. I don't think I even made any observation.

Q. Did anybody talk to you about the reading of the letter before you went to lunch? A. No.

Q. Only Commissioner Delany? A. That is all.

Q. You say that was about 11:30? A. About that time.

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Q. Did you go back into the meeting of the Budget Committee at about 2:30 after you got back from lunch? A. Yes.

Q. The minutes show 2:30. Does that conform to your recollection? A. Yes. There is a peculiar, a particular reason for remembering that day. We had that day a very large gathering there in regard to other hearings on the appropriations for charities, charitable institutions, and the room was packed and the people were standing all around the wall in each others way.

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Q. You are familiar with the method of transmitting intelligence around the City, as Mr. Mooney said, and have been for a good many years, haven't you Mr. Craig, familiar with newspaper reporters and the methods of newspapers? A. I have something of an idea—

Q. You are familiar with the methods of the City News Association? A. I have some knowledge of it.

Q. And have had, for some time, haven't you? A. Always, more or less. I don't attempt to keep in touch with whatever changes they make in their procedure from time to time. I would not attempt

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to qualify as an expert on how news is gathered and distributed.

Q. You have often had occasion to give out matter to newspaper men for publication, haven't you? A. Well, I have often had newspaper men come in and ask me questions and on many occasions I have answered those orally. And many times where the matter was a little complicated I have dictated a statement for them and occasionally I have dictated matters which I thought were of unusual public interest for publication in the form of a public statement. I know that inquiries are being

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constantly made to the Department, many of which never reach me at all, in relation to matters which the reporters may think have a news value.

Q. And as to this letter, I think you told Mr. Mooney, that you knew when you signed it, that it thereupon became an official matter, in the sense that it was a matter that was bound to become public sooner or later? A. Oh, I know that, as I knew it of everything that I put my name to. It is public property the moment I put my name to it; even if it never leaves my desk, it is subject to

2135 inspection right there.

Q. Now, Mr. Craig, let me ask you, if it was not a fact, as you read this letter now, that it is not designed for the purpose that you have testified on your direct examination of giving Mr. Nixon certain suggestions for his private use in bringing about certain matters, but was designed by you when you wrote it, for public consumption? A. I don't see how you could any more effectually design it for the purpose I have described than I did. I would be glad to have any suggestion from you, at any time, because I would like to see Nixon do

2136 the job even yet.

Q. The job you intended to have Nixon do—apparently, as I understand your testimony—and I want you to correct me if I am not correct—was to bring about access to original sources of information which you were anxious to get. Is that right? A. Nixon had—

Q. Wait a minute. Is that right? Is that what you wanted Mr. Nixon to do, to use his efforts to bring about access to original sources, which you have explained and described? A. Shall I have to answer that yes or no?

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Q. I would like to have you, if you can. A. It cannot be answered yes or no. I will explain it to you, if your Honor please.

Q. All right, go ahead and explain it. A. To my mind, Nixon was acting out of his sphere. I had no desire to express any wish to him, or have him do anything whatever. But he had injected himself into a situation where, as he says in his letter to me of October 3rd, which I received on the 6th, "That he was being forced into the calling of this conference and that there must be negotiations and that the last word was with the City 2138
of New York, the Municipal authorities" and in the light of that condition it semed to me that if Nixon was to serve any useful purpose whatever, it could only be in the direction of laying the foundation for a conference that could be held and out of which some results could flow, and that any effort in any other direction would be abortive and not only a nuisance to everybody else, but would only prolong the transportation difficulties.

Mr. Mooney: I think the words quoted from the letter should be concessions, not 2139
negotiations.

A. He said there must be negotiations. If I may have the letter a minute.

Mr. Mooney: Was that a slip of the tongue? You have been testifying with the letter in front of you now.

A. Yes, the letter of October 3rd.

Mr. Mooney: I think you will find it is "concessions" not "negotiations."

2140 A. His words are "There must be negotiations," and then, in another part he says—the whole paragraph there is "We cannot hope to get the full measure of concessions in advance. There must be negotiations." Then he concludes, "the final word is with the City government as to the sufficiency of concessions." He asked us to come over there without any sufficient equipment as to facts and investigation and to give the last word, which seemed to me an impossible thing to expect anybody to do. I made him the only suggestion that
2141 I thought then, or have thought since, and I have not heard anybody give any better, or to point any other way out.

Q. Am I right in saying: That way was to secure a reversal of the policy of denying access to original sources of information, as you said a moment before had been— A. If you will hand me the letter I will show you to what I am referring. That way that was expressed in the last paragraph of the letter: "As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complica-
2142 tions, should procure the entry of orders by Judge Mayer putting the City of New York on an equal footing with the private interests active in the receiverships. A. refusal to do this can but prolong and embitter the controversy; and it will not, in the end, procure any advantage, whatever, to the traction interests." That is preceded by the concluding part of the paragraph ahead of it, or rather the whole paragraph: "The responsibility for the turmoil, delay, and dissatisfaction that has followed upon the Orders of Judge Mayer, denying to the City of New York any representation in these

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receiverships rests upon those who procured and are protected by such orders." I don't know how to use the English language to convey that idea with any more conciseness or forceableness to such a mind as Mr. Nixon's than I have there employed.

Q. As I interpret your testimony—I want you to correct me if I am not fair in my interpretation—the only way of putting the City on an equal footing was for a co-receiver representing the City to be appointed? A. Yes.

Q. And the sum and substance of this letter to Mr. Nixon was, that the City will do nothing unless the Court appoints a co-receiver. Is that right? A. No. That is not the sum and substance of that letter. 2144

Q. Very well, if it is not. That is enough. I won't go any further. Did you make any effort, whatever, to kill—using the vernacular—the letter that had been given to the press by Mr. Kerrigan? A. I had no power to kill it.

Q. Did you try to kill it? A. I did not lift a finger one way or the other. I know from Mr. Delany over the telephone, as early as 11:30, that Nixon had read the letter to a conference of traction attorneys, and that it was then and there public property, and that he had frustrated the whole purpose for which the letter was written. 2145

Mr. Mathews: That is all.

By the Court:

Q. Let me ask you just one or two questions, very briefly. If I correctly gathered from what you say, your recollection is not very clear as to whether you saw the Court's order or memorandum

2146 of September 6th, 1919? A. My only uncertainty is as to whether I had seen it on or prior to October 6th.

Q. That is what I am getting at. You are not sure whether you did see it before October 6th? A. No.

Q. Well, now, as that leaves the time uncertain when you had seen it, are you sure you read it? A. Yes, I read it.

Q. And you read the clause, or sentence, to which attention has been called: That the receivers
2147 were making clear that every facility will be used to satisfy themselves in respect of the actual financial and other conditions in relation to the corporations now in their official charge? A. Yes, I read that.

Q. Now, did you have the impression that the Court would, if an application were made to inquire into the actual financial and other conditions referred to, did you have the impression that the Court would fail to assert all its power to see that you, in your official capacity, or any member of the Board of Estimate and Apportionment would
2148 have been the same access that the Court itself would have? A. Well, I had in mind that Governor Hughes was conducting some kind of an inquiry about that time for some people and this situation would cover him. I also had in mind this: That it was my judgment then, as it is now, for that matter, that no effectual opening up of the material facts in regard to these various contractual relations and the question of capitalization, that little can be ascertained except upon the most rigorous inquisition by a person in authority and control over those who have the actual physical cus-

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tody of these records; and that as a matter of fact that if any public officers were to attempt to do that, in the face of the outstanding restraining orders of a general character—that the moment they indicated the particular objective of their inquiry, it would be frustrated by the withdrawal of those records even from the Receivers themselves, probably in most cases without any personal knowledge on the part of the Receiver, so that, to my mind, the only effectual disclosure would be effected by a Receiver who will apply to that disclosure such vigor, such inquisition and such discipline over those in custody of the records that he is sure that everything would be forthcoming, and that anybody who stood in the way would be put out of the way.

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.Q Then, as I gather, you had, no doubt, in your mind, or no question as to the good faith of the Court? A. I hadn't any question in my mind that the Court meant what it said in that memorandum, but I had a very distinct opinion as to the effectiveness of that kind of action.

Q. That is what I was going to ask you. You had no question in your mind, I gather, as to the good faith of the Court and the desire of the Court that the fullest facility should be afforded. But, from your point of view, you did doubt that the desire of the Court could be made effective in ascertaining the facts with which you thought you ought to be acquainted, unless you, or some other representative of the City, was the receiver? A. It was a question of practicability in a given matter. Now, I have never had any doubt that the persons who were embraced in this description and the Court's memorandum would get such informa

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2152 tion as they called for, or access to such books as they called for, and would receive such aid from the Receivers and their subordinates as might be necessary to get what was called for; but that falls short, in my judgment, of the effective kind of relief that the City of New York must have in order to tap these things absolutely at their sources.

Q. What I am trying to get at is: Whatever may have been your opinion as to the practicability of an inquiry undertaken on the invitation of the Court through its receivers in these proceedings,
2153 do I understand correctly, that you at no time questioned in your mind the good faith of the Court in offering that? A. I never had any doubt that the Court thought that would give all the information anybody asked for, but I did have a very distinct opinion of my own that it did not reach the situation so far as the City of New York is concerned and the city has the most extensive interests by all odds of anybody to the controversy, both on the financial side as well as on the public's side.

Q. Did you know on October 6th from any other
2154 members of the Board of Estimate and Apportionment as to whether they had received this paper, Exhibit 26? A. My recollection is that that matter had not come to my attention at that time, except in some cursory way in the newspapers, and that I had had no opportunity to examine it closely or discuss it with anybody else. I want to add this, that in any event, the mere report of Stone & Webster would not reach the situation that the Municipal authorities had to deal with.

Q. I understand that perfectly. All I want to know is whether your recollection served you as to

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whether you had been informed by any member of the Board of Estimate and Apportionment on or prior to October 6th that such other member of the Board of Estimate had received this letter, Exhibit 26? A. My recollection would be all against that.

Q. And also is it your recollection whether any other member of the Board of Estimate discussed with you in any manner the subject matter of Exhibit 26? A. I am certain there was no discussion about it prior to that time.

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The Court: Very good.

Re-direct Examination by Mr. Mooney:

Q. One question: You were asked a question as to the excitement and turmoil. Have you had a compendium prepared under your own supervision of communications received by the Board of Estimate and Apportionment, communications received by the Comptroller, communications received by the Mayor and publications of the press of the City of New York all relative to this question of turmoil and excitement? A. Yes. 2157

Q. And is this that compendium (exhibiting same to witness)? A. Yes, it is.

Mr. Mooney: I offer this in evidence.

Mr. Mathews: May I see it?

The Court: There is just one other question, in view of some questions I asked Mr. Kerrigan, and that is whether in regard to sending matter to the newspapers in the manner, the method that has been described, and you are probably familiar with it, of

2158 having what they call flimsy copies made, and sent over to room 9 in the City Hall, whether Mr. Kerrigan had to receive from you any general authority, or whether his acts in such regard, could take place, in your relations with him, you, as the head of the Department, unless you specifically authorized it?

A. Why, that is a matter that is within the scope of the duties of the Secretary of the Department.
2159 It proceeds, in the first instance, upon this basis: That everything that is in the Finance Department is public property for anybody who wants it, and we very commonly make copies for people—that is, not newspapers only, but for any citizen that wants a copy of a document, although it may be very extended. We do that very commonly without making any charge. Sometimes it is so great that we have to make a charge, or charge a fee, under the statute; that being so, that is, everything being public property, it has always been the custom, long anterior to my time, for the Secretary
2160 of the Department of Finance to furnish additional copies of anything he saw fit or had any request for to the press for publication. The only restraint or limitation I know of on that is in regard to matters between the Comptroller and the Corporation Counsel, which are excepted by the statute, as being open to the public. So that only on very unusual occasions, when Mr. Kerrigan, or whoever may be the Secretary, has doubts as to something contained in the statement that is being sent out, as to whether it is justified or not, will he bring it to me; but so long as it is a mere copy of a

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record or proceeding in the Department, or of any report of any kind, of which I sign hundreds and thousands in the course of the year, they will never require any permission of mine, and I would not have any power, or exercise any restraint over it. They are all accessible to someone, and the reporters know this, so as a mere matter of accommodation it has been the practice of the Finance Department for a great many years, even before I was Comptroller, for the Secretary to furnish these copies, sometimes on his own initiative, and sometimes upon request. In this particular instance, as 2162
I recall it very clearly, when Delany called me on the telephone about 11:30, I knew, of course, that Mr. Nixon had made this letter public property; and it didn't raise any question in my mind at all, and when Mr. Kerrigan told me during the lunch hour that he had, at the request of somebody—I think it was Breen, of the Evening World—sent copies over to the reporters' room, because whether he sends it to them or whether they got them through Nixon was absolutely immaterial, it didn't affect me in the slightest and I didn't care one way or the other. That is the reason there was no 2163
particular conversation about it, even when he told me what had transpired.

The Court: In other words—

A. I am accustomed—I may add this—I am accustomed every day to seeing things in the newspapers and hearing of things that are about to be in the newspapers, over which I haven't any control of any kind, but that if I did have any control, I would like to see presented in a very much dif-

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ferent fashion. I am not a publisher of newspapers and don't make any claim in any sense of knowing what is good news, or news that is not so good. That is left entirely to the reporters and the publishers.

Q. And when you use the expression "care," do you mean by that you were not in a position to exercise any care or responsibility other than what you had already done in transmitting this in its regular course? A. I meant that there was nothing for me to do either one way or the other. Noth-
2165 ing that I could do that would affect it in any part or detail, in any direction. So there being no action I could take of any kind, I dismissed the matter from my mind forthwith.

Q. You did not use the words, "I did not care" in the sense of recklessness, but in the sense that it was a finished thing? A. In the sense that there was nothing requiring any action on my part and, therefore, I did not need to charge my mind with it.

The Court: I think I understand. Put-
2166 ting it in another way: The moment the letter was signed and filed in the office of the Comptroller, or a copy of it filed, it then automatically became a public record and then the Secretary can either give it out on his own motion, or at the request of somebody in accordance with settled practice and routine.

A. Yes. Procedure established for years.

Q. Now, when you speak of Mr. Kerrigan as the Secretary of the Department—in answer to these recent questions—does he do that entirely upon his own responsibility? A. Yes, on his own initia-

tive. In fact, that morning, Mr. Kerrigan had arrived late, as he has on one or two other occasions, and I did not see him before I went into the committee room. 2167

Q. Have you, since you became Comptroller of the City of New York, given any directions, whatever, touching upon or relating to this custom which was established, or had been established, in that office, as you have described it? A. No, only in so far as I have a kind of general requirement, even if not explicitly expressed, that I should never be quoted upon anything, unless I myself authorized the statement. Of course, if I have already signed a document, that is the end of that. Anybody is at liberty to make any extract from that that he sees fit. 2168

Mr. Mooney: This compendium is marked—

Mr. Mathews: The compendium is objected to, except as showing the matters therein stated are either complaints or letters received by the Board of Estimate, or the Comptroller, or the Mayor, or references to articles that appeared in the press and not as to the facts stated in any of the communications, or as to the facts reported in any of the press articles. 2169

The Court: I understand.

Mr. Mooney: That is substantially the limitation with which it is offered, simply to give a general idea of what the witness's examination relates to and to save time.

The Court: I will take it as being a compendium of matters showing public interest

at the time, and, of course, not as evidence of the truth of the matters therein set forth.

Mr. Mathews: And may it be understood that the Government may supplement that portion of this compendium by additions to it of matter relating to publications in the press, if it sees fit. I don't know that we shall want to.

Mr. Mooney: That is quite agreeable to me.

2171 The Court: Very good.

Mr. Mooney: In fact, I may say that the publications in the press here have been presented without any selection whatever, and have animadverted upon the action of the defendant with equal freedom to that shown others.

Compendium marked Defendant's Exhibit V.

2172 GEORGE T. VANVALKENBURG, recalled, on behalf of the defendant, testifies as follows:

Direct Examination by Mr. Mooney:

Q. Mr. VanValkenburg, when the letter of the Comptroller, about which you have already been examined in this proceeding, was typewritten and struck off by you, will you state whether there were any carbons struck off with it and what the form of the carbon was? A. One yellow carbon.

Q. And is there a practice in the Comptroller's office with respect to carbon sheets for these communications that are intended for office use, and a

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separate system with respect to those communications which are expected to be published? A. Yes, sir.

Q. What is the difference? A. Well, if one is to be published, I am asked to make a number of flimsy copies, and that goes on what we call report paper.

Q. And that is white paper? A. That is white paper.

Q. Was there any sets of flimsy or white paper such as you have described used on this occasion in connection with this letter? A. No, sir.

2174

Q. And were any of those flimsy or white papers struck off until after the communication had left the office on its way to Commissioner Nixon? A. Yes, after that.

Q. And these flimsies or white sheets of paper, are they substantially of the size of legal cap? A. Yes, sir.

Q. As distinguished from the square or nearly square size of the letter and the accompanying yellow carbon? A. Yes, sir.

Mr. Mooney: That is all.

2175

Cross Examination by Mr. Mathews:

Q. Do I understand you to mean by your testimony that invariably when a letter is given to the press it is originally put on this legal cap size? A. I don't understand your question, Mr. Mathews.

Q. You said there was a practice. I am now asking you whether that practice was invariable, that when a letter was to be given to the press its original transcript by you, when you write it from your

2176 notes, would be placed on legal cap sheets? A. Yes.

Q. It would invariably? A. Yes.

Q. Has there ever been an occasion when a letter originally written on sheets of this size, referring now to Government's Exhibit 2, was thereafter copied on legal cap sheets and those sheets given to the press? A. Yes, sir.

Q. Has that happened on more than one occasion? A. Yes, sir.

Q. About how many times has that occurred?
2177 A. Well, I could not say.

Q. A good many times? A. Well, when that is wanted, I am generally directed to see that there is, and probably I am told that a number of copies are to be given out to the press. I then write it on the long sheets of paper with the flimsy copies, on legal cap size paper.

Q. Have you here in court the carbon sheet, the yellow sheet made at the time you wrote out Exhibit No. 2? A. No, sir.

Mr. Mathews: Are they here, Mr.
2178 Mooney?

Mr. Mooney: I don't think they are, but we will gladly produce them if we can.

Q. You recall making a single carbon? A. Oh, yes, I do.

Q. And instead of filing that, you gave it to Mr. Kerrigan? A. I handed it to Mr. Kerrigan, yes.

Q. And he gave it back to you and asked you to have the usual flimsy copies made up for the press? A. I don't think he gave it back to me to have those copies made. I think it was handed to one of the typewriters to make the usual copies.

Q. But you knew that the flimsies were made?
A. I knew they were being made, yes.

The Court: Your handing the letter to Mr. Kerrigan was the usual routine, was it?

A. Not always, no. It was an interesting letter, and I simply handed it to Mr. Kerrigan and I said, "Here is an interesting letter." There are thousands—I won't say thousands, but many hundreds of letters I write, with simply the yellow copy, and I never show them to Mr. Kerrigan, because that is 2180
in the regular general routine business. But this one was an exceptional communication. I thought it would be interesting to him as Secretary to the Department of Finance.

Mr. Mooney: That is all.
Mr. Mathews: That is all.
The Court: The defendant rests?
Mr. Mooney: With one exception. Do you wish to have Mr. Van Valkenburg search and find the exact carbon copy of this paper? 2181
Mr. Mathews: Yes.
Mr. Mooney: I am expecting, in that connection, however, that the case will not be kept open more than nominally, as I am attempting to go into another engagement.

I would like to have considered as part of the record in this case, the memornadum, or decision of Judge Mayer, dated December 27th, 1919. The object and purpose of offering it being, that while it is dated after the letter, it states or reflects conditions that ex

2182 isted at the time of the writing of that letter. That is your Honor's memorandum.

The Court: I see no objection to that.

Mr. Matthews: I think it is really immaterial. We haven't gone at all beyond the date specified in the information and I would prefer to limit it to that date. I haven't read this recently, and it is probable that I wouldn't have any objection to it.

The Court: I am very familiar with it and while I have held strictly to the 6th of October, I presume that the purpose of

2183 Counsel is to show an outline of the general so-called traction situation, as the Court has outlined it, which situation was in effect on October 6th. That I assume is the sole purpose.

Mr. Mooney: That is, in substance.

The Court: In other words, if it should become a matter of any discussion, then instead of being compelled to go to other sources you have the Court's own outline of what it considered was the so-called transit situation.

2184 Mr. Mooney: That is the object of the offer.

The Court: With the limitations indicated I will receive it.

Received and Marked Defendant's Exhibit W.

The Court: Let the briefs be exchanged on the first Tuesday of September, and then let each side have ten days thereafter within which to serve a memorandum, if so advised, and a strict reply, not to go over the ground again, but just in the event that any of the briefs deal with some point not considered

by the other party, and then I will take the 2185
briefs—the seventh of September, and the parties will exchange on Saturday, the 18th, and we will make it—lay the briefs on my desk together with the record on the 20th day of September. That will give everybody a full opportunity. I have no desire to press any counsel during vacation.

Whereupon an adjournment was taken to June 10th, 1920, at 10:30 a. m.

2186

New York, June 10, 1920.

Trial resumed pursuant to adjournment.

PRESENT—The Court and Counsel, same as before.

Mr. Wolbarst: I renew the motions made at the close of the Government's case, particularly the motion to dismiss on the grounds then stated, and on the additional ground that the evidence affirmatively establishes that the defendant was not guilty 2187
of a contempt in writing the letter of October 6, 1919.

The Court: Decision reserved, with an exception noted on behalf of the defendant to the denial of each and every motion on the grounds of the motion.

2188 UNITED STATES DISTRICT COURT.

Before—MAYER, Judge.

UNITED STATES

vs.

CRAIG.

New York, February 24, 1921. 2 P. M.

2189 APPEARANCES:

For the United States: FRANCIS G. CAFFEY, United States Attorney.
DAVID V. CAHILL, of Counsel.
For the Defendant: EDMUND L. MOONEY, Esq.
RUSSELL LORD TARBOX, Esq., of Counsel.
CHARLES T. B. ROWE, Esq., of Counsel.

Colonel Caffey: In this case, if your Honor please, the defendant has been convicted of contempt. I now move for sentence.

Mr. Mooney: We have nothing to say, your Hon-
2190 or, further than has been said. We wish to say only, and this is repetition, that there has not been, and is not, any intention on the part of the defendant to commit any contempt against this Court. That has been so repeatedly said throughout the proceedings that I am sure I can add nothing to it by repetition.

The Court: The sentence of the Court is that the defendant be confined in the Essex County Jail in Newark, New Jersey, for sixty days.

The Clerk: Marshal, will you take the defendant in custody, please.

GOVERNMENT'S EXHIBITS ON CONTEMPT TRIAL. 2191

Government's Exhibit 1.

October
First
1919

Hon. Charles L. Craig,
Comptroller and Member of the Board
of Estimate and Apportionment,
Municipal Building,
New York, N. Y. 2192

Sir:

As an outcome of to-day's hearing on the separation of lines from the New York Railways Company, I feel that it is my duty to invite you to attend a conference of all parties at interest in the transit situation.

My position since taking office has been that in case any concessions were granted by the City that concessions in return should be made by the Companies, such concessions to be of a nature that will induce the City Government to grant relief. 2193

We are face to face, not only with vast losses to the people of the City, but with lowering of the standard of service, physical deterioration of property and equipment and demoralization of organization.

Had the matter received constructive and businesslike handling four months ago the present crises could have been avoided and the great system of free transfers saved to the traveling public.

For temporary concessions extended to the companies great and lasting benefits could have been secured to the people of the City.

2194

Efficient transportation is the life of our industrial and commercial enterprises. The disintegration already precipitated will lead to expense, inconvenience and confusion for the traveling public and almost insurmountable difficulties in regulation. And even worse is to come.

No one surely will assume the fearful responsibility of refusing to aid in mending this condition. The people of the City deserve better treatment as burdens are being fastened upon them that it will take many years to lift and some time even to

2195 lighten.

I suggest a preliminary meeting at the offices of the Commission next Monday morning at ten-thirty o'clock.

The traction companies I beg to take counsel and present such plans as they think will prevent further collapse and that will in addition weld together the parted units, to the end that cooperation may be secured to at least as full an extent as existed before the receiverships began. They must be prepared to make drastic concessions for any favors received.

2196 To the City, through the Board of Estimate and Apportionment, a plea is made for a sincere participation in this conference (either in their individual official capacities, as a Board, or through a representative with power) which should secure advantages to the people.

A general readjustment, fair to all, can only be secured by a round-the-table discussion leading up to negotiation. The City holds the whiphand in the matter as the companies seek concessions.

Each side believes in the integrity of its claims, but human nature is such that it seems futile to

2197

expect the limit of concession to be stated by either unless satisfied of the earnest desire of the other to secure an agreement.

It may be necessary to review figures and examine leases and agreements that will consume time, but no further time should be lost in starting to secure a meeting of minds on this vital subject.

Very respectfully,

LEWIS NIXON,
Commissioner.

2198

Government's Exhibit 2.

DEPARTMENT OF FINANCE

CITY OF NEW YORK

October 6, 1919.

CHARLES L. CRAIG,
Comptroller.

Hon. Lewis Nixon,
Public Service Commissioner,
No. 49 Lafayette Street,
New York City.

2199

Dear Sir:

Replying to your letter of October 1st:

Apparenty without inquiry and without information you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the Finance and Budget Committee of the Board of Estimate and Apportionment (comprising the entire Board), to drop the preparation of the largest budget in the history

2200 of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late.

In your letter you say:

> "It may be necessary to review figures and examine leases and agreements that consume time."

Before any such conference can be seriously con-
2201 sidered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

When the applications were made to Judge Mayer in the "friendly" proceedings instituted by
2202 those interested in these corporations for the appointment of a Receiver of their own liking, if not of their own selection, the Corporation Counsel of The City of New York, acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge Mayer that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just

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to The City of New York, and the members of the Board of Estimate and Apportionment might be accuratey informed with respect thereto in order that any action deemed necessary by the City might be taken.

As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where they are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge Mayer set himself against it. It was clearly understood that conditions were certain to 2204
develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief but he made orders which preclude any application being made by the municipal authorities to any other Court or Judge for my right of examination into the affairs or conditions of these corporations seeking municipal aid and favor.

2205

Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the municipal authorities the opportunity to ascertain the truth.

The franchises and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs and the darkest scandals of municipal history, both in the old City of New York and in the City of Brooklyn prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the

2206

hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interest. They will open and open wide without any reservations or restrictions before there will be any conference so far as I am concerned.

It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should
2207 stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the municipal authorities, to deny them the most effective instrument of redress, and to force into a contest with corporate powers entrenched in darkness and concealment.

The responsibility of the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to The City of New York any representation in these receiverships, rests
2208 upon those who procured and are protected by such orders.

As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge Mayer putting The City of New York on an equal footing with the private interests active in the receiverships. A refuse to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

Yours very truly,

(Sgd.) CHARLES L. CRAIG,
Comptroller.

DEFENDANT'S EXHIBITS ON CONTEMPT TRIAL. 2209

Defendant's Exhibit "A."

October 3rd, 1919.

Hon. Charles L. Craig,
Comptroller of The City of New York,
Municipal Building,
New York, N. Y.

My dear Mr. Comptroller:

I have been wishing for an opportunity to discuss matters with you, but owing to the intemperate 2210
attitude of the Mayor in connection with any act of mine, I have not asked for a conference as any talk with me might have excited violent dissatisfaction in certain quarters, and I dislike being a source of discord even in an official family.

Owing to certain facts that developed at the hearing of Wednesday I was practically forced to call the conference to which you are invited Monday.

We cannot hope to get the full measure of concessions in advance. There must be negotiations.

I trust you will agree with me that this is City's business of so vital a nature as to compel partici- 2211
pation.

The final word is with the City Government as to sufficiency of concessions.

While I am stated to act above the law surely in this case I am simply trying to adjust a situation that should not continue and one in which it is the duty of all charged with public trusts to aid.

With kind regards, I remain

Yours very truly,

LEWIS NIXON,
Commissioner.

2212 **Defendant's Exhibit "T."**

COMPENDIUM.

ABSTRACT OF TESTIMONY TAKEN IN THE INVESTIGATION OF THE INTERBOROUGH METROPOLITAN COMPANY AND THE BROOKLYN RAPID TRANSIT COMPANY BY THE PUBLIC SERVICE COMMISSION, FIRST DISTRICT, WILLIAM M. IVINS, EXAMINER, POPULARLY KNOWN AS THE IVINS INVESTIGATION.

2213

"The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings." (Letter Oct. 6, '19, by Comptroller Craig—See Information.)

Cost per mile of 34th Street Crosstown Railway underground trolley—$6,472,287.00 (pages 199).

Cost per mile of Fulton Street Road (Horse)—$2,553,097.00 (pages 199).

As compared with:

2214 Eighth Avenue Railroad Company, underground trolley, cost per mile—$166,143.00 (pages 199), and

Pelham Park Line (Horse)—$24,836.00 (pages 199).

Asked to explain how it was possible for a road to cost $6,472,287 per mile (referring to that of 34th Street Crosstown) for road and equipment, Shonts, who was President of the Interborough-Metropolitan Company, testified that he was not sufficiently acquainted with the past history to answer, and knew the roads only as he found them (page 200).

2215

Hedley, who was manager of the Interborough, testifying, admitted that the Interborough makes its largest profits during the rush hours when carrying the most standing passengers (page 250).

He also asserted that it was not a matter of common complaint that citizens cannot get seats during non-rush hours—(this was contrary to common knowledge)—and that no more than perhaps two or three complaints by citizens regarding inefficient service during non-rush hours had come to his attention (page 282).

2216

N. Y. City Railways Cos'. Statistics.

There appear in the Record (Vol. I, Ivins Investigat. inserted at or between pages 427-501) tables relating to each of the roads constituting the New York City Railway System, giving statistics year by year, showing the amount of the capital stock, funded debt, unfunded debt, cost of road and equipment, receipts, operating expenses, interest and taxes, dividends, passengers carried, length of road, cars and horses.

From these statistics, certain circumstances, among others, are deducible. The general deduction from the statistics is, that the financial matters of the roads were subjected to juggling, and watered; that the books were badly and imperfectly kept, and that information was on occasion either willfully suppressed or carelessly compiled. Thus the statistics show, taking two of the roads for example:

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(1) The cost of road and equipment of the *N. Y. & Harlem R. R. Co.* as shown by the June 30, 1904, report was $22,220,726.16, but although the road

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was then (1907) operated by underground trolley, the cost of the change does not appear in any of the Company's reports. The change was made by the lessee and presumably charged under "Additions and Betterments of Leased Lines."

(2) Sixth Avenue R. Co. (page 432).

In 1866 paid dividends which were not earned (pages 433-435).

In 1870 had funded debt of $250,000 and floating
2219 debt of $85,100, although it had added during the period from 1865, but about $200,000 for road and equipment (page 435).

In 1869 the cost of the road was given as reduced by about $270,000 without explanation (page 435).

In 1874 the floating debt increased without explanation, and only $75,000 was charged to construction and equipment. The Company paid the usual 10% dividend though not earned (page 435).

Up to 1876 (from 1873) the Company had increased its cost of road and equipment by $1,637,356, but the length of the road had increased only one-quarter of a mile, and it had increased its
2220 debt $1,244,000 (page 435).

Similar circumstances are shown in the summary as to the 8th Ave. R. R. (pages 459-460); the 9th Ave. R. R. (page 468); the Bleecker St. & Fulton Ferry R. Co. (page 470); 28th & 29th Sts. Crosstown R. Co., indication of "water" (page 478); 34th St. Crosstown R. Co. (page 483); Fulton St. R. Co. (pages 486-7)—indications of water; Westchester Electr. R. Co. (page 489); Tarrytown, White Plains & Mamaroneck R. R. (page 493); N. Y., Westch. & Conn. Tract. Co. (page 495); Yonkers Railr. Co. (pages 499-501).

2221

STEINWAY TUNNEL.

Interborough paid $402,000 for stock of N. Y. & L. I. R. R. Co. controlling the tunnel, the Company being incorporated for $100,000, and the money was paid to one John Pierce, supposed to be representing all the stockholders. Bryan, President of the Interborough, didn't know who the shareholders were at the time of the acquisition, where the money went, or whether it was paid by cash or check.

2222 In transfer tax proceedings on the Estate of William Steinway his holdings of 425 shares of the N. Y. & L. I. R. R. Co. stock, 75 shares less than one-half of the stock, were found first to be valueless, and later listed as having been sold for about $39,000 odd (though the I. R. T. paid Pierce $402,000 for the whole stock).

The Interborough Rapid Transit Company paid $7,785,579.05 for the "construction" of the Steinway tunnel (page 18).

Aug. Belmont and the I. R. T.'s $10,000,000 *Gold Note Issue.*

2223 This issue of June 30, 1905, was sold to August Belmont & Co. who received a discount thereon of $300,000, and in January 19, 1906, a discount of $150,000 on a second sale—in all $450,000—in addition to a three-quarters of a per cent. for doing business (page 649). Bryan, President of the Interborough Rapid Transit Company, said he was not familiar with the terms (page 647), but though not explaining it, or indicating the name of any person who could explain it, attempted to defend the charging of the $450,000 discount, and the commission paid to August Belmont & Co. for selling the

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notes as a proper charge against construction account (page 649).

August Belmont, whose firm received the above mentioned discounts or commissions personally, received a salary of $75,000 a year (average) from October 27, 1904 to February , 1907 (page 653).

Other Charges Against Construction Account.

$ 500 to National Civil Federation (page 652);
2225 $10,000 to McGraw Pub. Co. for publishing;
$ 3,471 a souvenir book (page 652);
$25,000 to Joseph S. Auerbach;
$25,000 to W. G. Oakman (page 653).

Auerbach and Oakman received this money for closing the Manhattan Company's lease, in no wise related to subway construction (page 657).

Mr. Ivins' contention was that these various amounts, including Belmont's $450,000 discount were charged to construction account so as to saddle it as a construction payment under the terms of the City's subway contracts, which would fall
2226 on the City, and also not to reduce the dividend paying capacity (page 657).

I. R. T.'s Books.

Edward F. J. Gaynor, I. R. T. auditor, testified the I. R. T.'s books had never been audited by anybody except the company's auditors, i. e. that there had never been an independent audit made (page 688).

The $402,035.17, which in the early stages of the Ivins Investigation it was asserted was paid to John Pierce, supposedly representing all the stock-

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holders who held shares in the New York & L. I. R. R. Co. which controlled the Steinway Tunnel, was according to the statement of Delancey Nicoll read into the record at page 695, 696, disbursed in detail as follows:

Date, December 31, 1903; Paid to Aug. Belmont & Co.; amount $33,894.75; Remarks, Cost of franchise, etc.

Date, March 8, 1904; Paid to John Pierce; Amount $250; Remarks, Cost of survey in Long Island City.

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Date, September 23, 1904; Paid to Aug. Belmont & Co.; Amount $54,100; Remarks, Refunding amount paid to John Pierce for assignment of Oliver W. Barnes' judgment against the N. Y. and L. I. Railroad Company.

Date, January 28, 1905; Paid to John F. Buck, Assistant Treasurer; Amount $50; Remarks, fees, Real Estate Committee.

Date, March 14, 1905; Paid to Alfred A. Gardner; Amount $98.05; Remarks, disbursements account of franchise N. Y. & L. I. Railroad Company.

2229

Date, July 8, 1905; Paid to Treasurer State of New York; Amount $5,000; Remarks, Permit for use of Man of War Reef.

Date, July 19, 1905; Paid to Edward Lauterbach; Amount $7,500; Remarks, Legal service, account of N. Y. & L. I. Railroad Company.

Date, August 1, 1905; Paid to Strong & Cadwalader; Amount $3,142.37; Remarks, Legal services and disbursements; account of N. Y. & L. I. Railroad Company.

Total $402,035.17 (Pages 695, 696) (Sum., 21, 22).

Payments aggregating $43,000 to Mr. Wickersham and to Nicoll, Anable & Lindsay, were charged

2230 to Equipment Account of the I. R. T. Co. (708 Sum., 22).

Subway Equipment Account of April 21, 1903, is charged with $28,644.03 for legal expenses to Rapid Transit Construction Company without anything on the face of the books to identify to whom these legal expenses were paid (709 Sum., 22).

April 5, 1904, Subway Equipment Account is charged with services of Strong & Cadwalader as general counsel $25,340.66. (709 Sum., 22).

D. C. Moorehead prior to February 14, 1902, the date of the execution of the lease between the
2231 Metropolitan and the Interurban was auditor of the Metropolitan Street Railway Company and after the lease became Secretary and Treasurer of the Metropolitan and auditor of the Interurban (757 Sum., 23), testified that 100 shares of stock which he did not own were put in to qualify him as a director of the Metropolitan, and that without any knowledge on the subject whatsoever he voted in favor of the lease for 999 years which turned over the entire Metropolitan Street Railway system to the Metropolitan Securities Company which owned a carbarn, three or four cars, and as Moore-
2232 head described them "Valuable franchises" (758, 764 Sum., 23). Moorehead swore that he voted for the lease because of the personality of the persons whom he believed were interested in the securities company. He had little or no knowledge of the transaction at the time of casting his vote (763, 764 Sum., 24). Mr. Widener who presided at the stockholders meeting at which the lease was ratified used the expression "Gentlemen, you will vote first and discuss afterwards" (765 Sum., 24), and Moorehead added that there was no discussion before or afterwards (765 Sum., 24). Moorehead ad-

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mitted that Elkins, Widener, Dolan and Vreeland were usurping the functions of an Executive Committee of the road of the Metropolitan although there was no provision for any such committee by the by-laws (765 Sum., 24). Moorehead pretended to be ignorant of the fact that a syndicate received 2½% from Kuhn, Loeb & Co. for presumptively underwriting $23,400,000 of securities 90% of which had already been subscribed by the shareholders of the Metropolitan Street Railway Company (769, 770 Sum., 25), and he professed to be ignorant also of the fact that some of the shareholders had thus received 2½% more than other shareholders, and that Kuhn, Loeb & Co. received for underwriting $630,000,000 the sum of $1,500,000 (770 Sum., 25). No entries to indicate the payment of the 2½% above referred to as appeared by Plaintiff's Exhibit 32, in the record of the Wormser case to have been paid to James Stillman, E. J. Berwind, G. G. Haven, James H. Hyde, A. D. Juilliard, Grant B. Schley; A. N. Brady; J. B. Duke; Norton Trust Company, Hon. Levi P. Morton, Redmond Kerr & Co. (for. J. J. Corbiere), Col. S. P. Colt, Edward Lauterbach, W. H. Baldwin, Jr., E. H. Harriman; S. Loeb, James Loeb, Lewis S. Wolff, George H. Huhn & Sons, Thomas P. Fowler; Kuhn Loeb & Co., appear on the books of the Metropolitan Street Railway Company or the Interurban Railway Company, nor were any entries made of anything corresponding to the payment of $1,500,000 to Kuhn Loeb & Co. above referred to (770 Sum., 25, 26). John D. Crimmins, a director of the Metropolitan Street Railway Company was to receive 7½% for supervising the reconstruction work provided for under the lease.

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DESTRUCTION OF THE BOOKS OF THE METROPOLITAN STREET RAILWAY COMPANY.

Moorehead swore that in the Spring of 1905, while the Wormser case was still pending and undecided in the Court of Appeals, he sold all of the books of the Metropolitan Street Railway Company prior to 1902 to a junk dealer at the rate of three-quarters of a cent per pound under which the company received $117.00, and in the contract of sale
2237 to the junk dealer there was embodied in Moorehead's own words "A written guarantee from Mr. Darnstadt stating that the books would be converted into pulp at once at their mills" (774, 776, Sum. 26, 27).

According to Moorehead the books so destroyed contained a record of everything that had occurred from the date of the birth of the Metropolitan Street Railway Company and its predecessors to April 15, 1902 (777, Sum., 27, 28). Moorehead said nobody told him to destroy the books and he did it of his own volition because more storage
2238 space was needed at the storeroom but he asserted his destruction of the books was no secret for he had told Mr. Quackenbush thereof in 1905, that is, some months after he destroyed the books (777, 779, Sum. 28). Moorehead even at the time of the investigation asserted that he did not then know that the destruction of the books was a crime and that they were a quasi public record although he admitted that he never heard of any other company besides the Metropolitan Street Railway Company that had sold its journals to a junkman to be destroyed (779-782, Sum. 28, 29). In the destroyed

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books according to Moorehead were the records of consolidations and increases of capital stock from time to time from $16,500,000 until it finally reached on August 2, 1900, $52,000,000 (784, 785, Sum., 29).

All bookkeeping entires relating to transactions between the Metropolitan Street Railway Company and the Metropolitan Traction Company by one of which a payment as large as $6,000,000 was made to the Metropolitan Traction Company disappeared with the destruction of the books (Sum., 29). As the place left vacant by the destroyed books, was 2240
filled with books and records from the various divisions, that Moorehead was compelled to admit that he had made room for minor matters of account at the expense of the destruction of the major matters (788-789, Sum., 29, 30). A. W. Teele, a certified public accountant (790, Sum., 30), testified to an examination he made of the report made by the accountants J. C. Hertle and Max Teichmann whose examination of the books according to their report had disclosed items aggregating $19,186,000 liabilities that had not been entered on the books of the Metropolitan Street Railway Com- 2241
pany. Teele testified that he had found this omission to be a fact but had also found that a similar amount of assets had been omitted from the books and were nowhere carried on the books (794, 795, Sum., 30, 31). In the correspondence that occurred between Belmont and Gaynor over testimony that had been brought out connecting Belmont's name with various transactions in the Ivins Investigation, Gaynor stated in his letter to Belmont that Belmont's salary from July 1, 1903, to July 1, 1906, was at the rate of $50,000 a year and

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was charged to Subway Equipment Account and that until June, 1906, an annual charge was made to Subway Equipment Account for the services of August Belmont & Co. "As financial managers, whose duties to that date were principally connected with the fund raised to purchase equipment" (805, 806, Sum., 32). Oren Root, Vice-President and General Manager of the Metropolitan Street Railway Company, who in 1907, at the time of the investigation was thirty-four years of age, testified he had been in the employ of the road twelve years
2243 and was what might be called "Chief Operating Officer" of the road (864-865, Sum., 34). At the time of the execution of the Metropolitan Street Railway Company and Interurban Company lease, February 14, 1902, Root was a director of the Metropolitan Street Railway, qualified by shares not owned by him but standing in his name (867-868, Sum., 34), and he likewise voted for the lease though he knew the lessor to be a railroad with two or three cars which he had never seen (869-879, Sum., 34). His impression was that the Interurban also owned four or five miles of track and a
2244 carhouse somewhere in Mt. Vernon (870, Sum. 34, 35). The Interurban also had, said Root, some fifty or sixty miles of franchises in the Bronx (870-871, Sum. 34, 35). Root had not inquired at the time of the execution of the lease whether the property of the Interurban was mortgaged but he was satisfied that it had considerable financial backing behind it (871, Sum. 35). None of the fifty or sixty miles covered by the Interurban franchises had, up to 1907, been built upon (873, Sum. 35). A probable explanation for this is that at the time of the lease the Metropolitan owned the Third Ave-

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nue system which in turn owned the Union Railway Company so that by letting these franchises lie unused it left the Bronx open to the Union Railway Company without competition giving that Railway Company a practical monopoly (873-874, Sum. 35). Root largely relied on Vreeland's judgment upon the soundness of the Interurban (874, Sum. 36). Root had never heard of the destruction of the books he said, until it was developed in the Ivins Investigation (879, Sum. 36). Root said that his chief reason for voting in favor of the lease was the financial responsibility of the men behind it and the possibility of obtaining necessary funds to fund the floating debt of $11,000,000 and to develop and reconstruct certain horsecar lines (877-878, Sum. 36), but Root did not know whether the expected $11,000,000 ever was actually paid in and he admitted that there was no way of definitely ascertaining this in view of the destruction of the books by Moorehead (878, Sum. 36). Mr. Ivins contended that there was a discrepancy of $5,000,000 of this amount which had been lost trace of owing to the destruction of the books (878, Sum. 36). Root identified Defendant's Exhibit E found at page 514 in the Case on Appeal to the Appellate Division in the Wormser case by which it appeared that although the net earnings for the year were $3,019,500.27, and other income was $404,024.17, thereby aggregating $3,423,524.44 dividends were paid aggregating $3,639,744.50, in other words, $216,220.06 in excess of the amount earned was paid out in dividends so that a deficit of $216,220.06 resulted for that year (890, Sum. 37). Root asserted that this might be explained by the fact that the figures in the memorandum were for the calendar year whereas the dividends were paid out on

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2248 the basis of the fiscal year but he was compelled to admit that figured on the basis of a fiscal year a dividend of $31,000 would have been shown and had the franchise taxes been paid the deficit of $31,000 would have been increased to several hundred thousand dollars additional (891-909, Sum. 37). Root had testified in the Wormser case that "Now the result of all this arrangement that was made was that the Metropolitan Securities Company through its ownership of the Interurban stock bought everything that belonged to the Metropoli-
2249 tan system, leases and everything else and they agreed to advance this $23,000,000 which was necessary to pay off the floating debt" (Sum. 37-38). But in the face of this testimony Root was forced to admit that 99½% of the 80% of this $23,000,000 subscription came from the stockholders of the Metropolitan Street Railway Company or their assigns because those shareholders subscribed to 80% of the Securities Company stock (909-910, Sum. 38), and therefore instead of the Metropolitan Street Railway Company getting $23,000,000 from the Metropolitan Securities Company
2250 as Root had testified in the Wormser suit, 99½% of 80% of the $23,000,000 was subscribed by the shareholders of the Metropolitan Street Railway Company (911-912, Sum. 38).

THE HERTLE REPORT.

In the report of John C. Hertle, accountant, to Col. W. Amory, relating to the financial condition of the Metropolitan Street Railway Company, spread upon the record as Exhibit 6, commencing at page 937, it was stated: "Inability to verify as-

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sets as claimed in the company's first annual report" (945, Sum. 38-39).

In the report of the Metropolitan Street Railway Company to the railroad commissioners for the year ending June 30, 1894, Vol. 2, page 879, Hertle found the following: "Cost of road and equipment to 30 June, 1894, $15,058,276.96" and again in the same report, at page 880, Hertle found in the company's general balance sheet under the head of assets the same amount, i. e., $15,058,226.96. Hertle's comment on this is:

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"This amount I have made every effort to verify but find it impossible to do so owing primarily to the fact that the company's report for 1894 does not show a cash statement of receipts and expenditures nor any statement of additions and betterments made under date of its consolidation of November 29, 1893, to June 30, 1894; and moreover, with all my efforts to check the figures it seems impossible to account for so large an expenditure by many millions of dollars. Such attempts at verification would have been simplified had 2253
all the railway companies to comply with the law by filing their annual reports with the railroad commissioners. I find that neither the Broadway Railway Company nor the Lexington Avenue & Pavonia Ferry Railroad Company ever filed such annual report while it appears that the reports of the Houston West Street & Pavonia Ferry Railroad Company for several years were inaccurate or incomplete." (948, Sum. 39.)

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Hertle showed that not until four years had passed after consolidation did the Metropolitan Street Railway Company acknowledge its liability for a funded debt specifically assumed on account of the first mortgage bonds of the South Ferry Railroad Company amounting to $350,000 (Sum, 40).

As the total cost of road and equipment up to June 30, 1894, was stated in the company's report to the railroad commissioners as amounting to $15,058,226.96, and as Hertle assumed it must have
2255 included the $350,000, he stated in his report, "I accordingly state that on June 30, 1898, the company laid claim to assets amounting to $350,000 which seems to be a duplication of assets already claimed and which, in my opinion the company was not correctly entitled to." Hertle found that the Metropolitan Street Railway Company had by its report of liabilities as contained in its annual report of June 30, 1894, omitted therefrom $19,186,000 of liabilities as shown by the itemized figures at page 955, Sum. 41, 42. Hertle demonstrated by comparing a statement filed by the Metropoli-
2256 tan Street Railway Company on an application made by it to the stock exchange for the listing of its securities whereby a valuation was set upon its stocks and bonds of $12,075,668.73, with the items carried in its general balance sheet on June 30, 1897, among the assets of the Metropolitan Street Railway Company as bonds of other companies $12,075,668.73, that the Metropolitan Street Railway Company had listed among these alleged securities, stocks and bonds that were absolutely worthless and which most conservatively etimated were worth instead of $12,075,668.73 as claimed by

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the Metropolitan, only $8,112,925 at the outside, showing an over-valuation of $3,962,743.73 (958-962, Sum. 42-44).

Furthermore, Hertle found that the Metropolitan Company's statements from 1896 to 1901 showing an alleged increase in its holdings of stocks and bonds in other companies amounting to $3,241,803.62, could only be accounted for "On the theory that a new and fictitious valuation had been adopted for the investments already detailed, as the records of cash payments do not account for it nor can I find any other record which would 2258 account for this increase." (962-963, Sum. 44), and Hertle described this claim of the Metropolitan as a fictitious and unwarranted over-valuation in investments among its assets amounting to not less than $3,241,803.62. (964, Sum. 44).

Hertle also found that on June 30, 1901, the Metropolitan Street Railway Company was in arreas for taxes in an amount exceeding $2,500,000. or $1,600,000. not including the franchise taxes which was in litigation (964-965, Sum. 45). Hertle found an omission from the Metropolitan Street Railway Company's reports of 1891, 1892, and 2259 1893, of the liability assumed by it of the $6,000,000. of theHouston West Street and Pavonia Ferry R. R. Co., second mortgage bonds which had been issued prior to its consolidation with the Metropolitan in 1893. (972, Sum. 45).

Hertle's findings, seven in number, appearing verbatim at 970-972, Sum. 45-47, were in substance that liabilities and assets that should have been included were omitted; that since 1894 the Metropolitan had claimed surpluses which did not exist; that none of the company's annual reports to the railroad commissioner since 1894 correctly

2260 described the company's true financial condition; that on June 30, 1901, although the company claimed a surplus of $5,403,465.52, and actually paid dividends amounting to $3,393,262.25, no surplus actually existed on that date but a large deficit did exist and the payment of such dividend was not warranted; that liabilities aggregating $24,377,803.62 were omitted from the statement of the Metropolitan Street Railway Company of June 30, 1901, as the company instead of having a surplus as claimed of $5,403,465.52, actually had a de-
2261 ficit of $18,974,338.19; that these figures have been arrived at by allowing the Metropolitan Company credit on every doubtful point even where the company's claims were not warranted but yet were not capable of disproof. Hertle's final conclusion is most significant. He says: "That in order to arrive at a complete and correct statement of the affairs of the Metropolitan Street Railway Company it will be absolutely necessary to make an exhaustive examination of the company's books and records (972, Sum. 47).

Patterson, Teele & Denis, certified public as-
2262 countants, were engaged by District Attorney Jerome to report on the report of Hertle and Teichmann and one of their conclusions was that "the omission of $19,186,000. of funded obligations of leased lines assumed by the company does not affect the surplus as assets of a corresponding value have also been omitted;" (1001, Sum. 47). They also agreed with Hertle that the $350,000. obligations of the South Ferry Railroad Company and the $2,500.000. of Broadway Surface Railroad Company bonds should have been included as liabilities and they asserted that the railroad company

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had since the Hertle report included the $350,000 item, (1031, Sum. 47).

Four checks, two to the order of L. E. Quigg for $1,000. and one to his order for $1,500. and one check to the order of Eugene Elsworth for $1,875., were read into the record by Marvin Scudder as the first step in the attempt to reconstruct the destroyed or lost books of the Metropolitan.

Oren Root recalled admitted that as shown by an analysis of the income and disbursements of the New York City Railway system for the year ending June 30, 1906, the rentals of the Metropolitan 2264
Street Railway Company were $3,640,000 a year on the $52,000,000 of stock, and the rentals on the Third Avenue Road were $960,000 which made a total of $4,600,000 against which there was a balance of receipts of disbursements of only $1,376,477.56, leaving a deficit of $3,224,000 for the year (1127-1128, Sum. 30). Moorehead testified that the three checks hereinabove alluded to to the order of Quigg were charged against construction account because he, Moorehead, presumed that Quigg was employed on construction work (1157-1159, Sum. 50). At pages 1356-1363 appears 2265
a list of the books, records, etc., of the New York City Railway Company and its predecessors prior to April 1st, 1902, which were not destroyed by the junkman and were on hand on September 23, 1907 (Sum. 50).

CONSTRUCTION ACCOUNT.

At the time of the destruction of the ledger of the Metropolitan Street Railway Company by the junkman the amount debited to special construc-

2266 tion therein, was $700,000 or more, according to Moorehead, but Moorehead was unable to produce the checks or vouchers against this account although he had frequently been requested to do so (1365-1366, Sum. 51), except cancelled checks amounting to $20,000 (1366, Sum. 51), and he finally admitted that all of the cancelled checks aggregating $798,000 had disappeared except the cancelled checks aggregating $20,000 (1366, Sum. 51). Moorehead said anybody in the office had access to those checks although he was the custodi-
2267 an of them during their disappearance (1366-1368, Sum. 51), and they were examined at the time of the sale of the ledger and journal to the junkman and he believed that they were probably then mislaid (1368, Sum. 51).

Not only have these checks disappeared but the entries in the check stubs were so made that the names of the payees of the checks were omitted (1369-1370, Sum. 52). Moorehead was so evasive about what had become of the checks that Mr. Ivins was prompted to ask him this question: which is offered you under this law is not immuni-
2268 ty for an acton for perjury?" and he replied, "Perfectly, sir." Moorehead said that the reason he did not enter the names of the payees of the checks under this construction account on the check stubs was that it was desired to keep the names secret from the clerks, and this explanation nowithstanding the fact that the clerks had free access to the checks themselves (1370-1371, Sum. 52). Mr. Ivins read into the record the checks which were actually produced practically all of them being payments to either Quigg or Vreeland (Sum. 53-54), the payments to Vreeland aggregating $25.

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000 and the payments to Quigg aggregating $17,477 so that of the $800,000 Moorehead was able to account only for $57,909.90, of which $42,770 was paid to Vreeland and Quigg (1373-1375, Sum. 54). The voucher showing the payment of the $25,000 to Vreeland was approved by Vreeland himself (1377-1378, Sum. 54). The typical itemized voucher of one of the payments to Quigg of $477 showed that the Metropolitan was paying his office rent, telephone calls to and from Albany, expenses of trip to Albany, and miscellaneous expenses including subscription to the City Record, 2270
etc. (1378-1379, Sum. 55). On some of the stub check books in which the names of the payees were omitted there were pencil quotations of Quigg's initials (1380-1381, Sum. 55-56). Marvin Scudder found from an examination of general ledger number one of Metropolitan Securities Company that there was held in undistributed accounts the following charges of payments to the following person:

Thomas F. Ryan, $24,000.00, June 9, 1903.
Standard Trust Company, $28,500.00, August 7, 1903. 2271
Interurban Street Ry., $60,000.00, October 3, 1903.
Morton Trust Company, $27,492.56, April 22, 1904.
Charles A. Conant, $25,000.00, August 26, 1905 (1382-1383, Sum. 56).

Scudder found that from 1902 the time of the opening of the books to date there had been paid to lawyers the sum of $921,439.68 (1384-1387, Sum. 56), exclusive of sums paid to lawyers in behalf of clients of other lawyers where property was purchased through such lawyers (1384, Sum. 56).

During this time the total paid to Quigg was $217,307.77 (1384, Sum. 56).

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In addition to payments to Quigg and to lawyers which aggregate more than $916,000, as shown above, the books as rewritten purely on a cash basis show these payments:

New York City Interurban	$42,667,624.57
Morton Trust Company	13,296,261.20
Kuhn, Loeb & Company	10,582,158.33
National Bank of Commerce	2,561,826.26

(1384, Sum. 56).

2273 A payment to N. Brady of $965,000 was carried to property account. That was the price paid Brady for the purchase of the Wall Street and Cortlandt Street franchises (1385-1386, Sum. 57). As was later developed Brady claimed that he only received $250,000 of this money and that the balance was paid back by him in checks as follows:

One to Moore & Schley for	$134,028.92
" " William C. Whitney for	111,562.78
" " Thomas F. Ryan for	111,562.78
" " Thomas Doan for	111,562.78
2274 " " P. A. B. Widener for	111,562.78
" " William L. Elkins for	111,562.78

(1617, Sum. 86).

Schley, of Moore & Schley, subsequently testified that the $134,000 paid to his firm in this transaction was credited to the account of William C. Whitney who carried an account with Moore & Schley as brokers (, Sum.). The other payments found by Mr. Scudder upon reconstruction of the account by vouchers from other sources appear at page 1388, Sum. 57. Scudder testified

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that he found a memorandum on the last sheet in one of the stub check books which would indicate that two payments of $5,000,000 and $780,000 were made on July 8, 1902, and on November 12, 1902, to the order of the Morton Trust Company for which no corresponding entry was ever made in the stub (1388, Sum. 58), and as to the $5,000,000 check above referred to there appears to be no entry on the books of the Metropolitan Street Railway Company on that date (1389, Sum. 58). Lemuel E. Quigg was called and testified that he had received from the Metropolitan Securities Company 2276
between November 24, 1903, and the date of the hearing in 1907, a period of about four years, an aggregate of $217,307.77 (1395, Sum. 59). The nature of his services as appeared from his own testimony seemed to be that he was, as he described himself, an accelerator, receiving an annual salary of $10,000 which was charged to property and franchise, page 1402, and which ws subsequently increased to $15,000 a year in addition to fees and other expenses (1403, Sum. 61-62). His services, as near as can be gathered from the record, consisted in his causing subway propaganda associa- 2277
tions to be formed on the east and west side for the avowed purpose of advocating subways, but for the purposes as he claimed of defeating the Belmont inteersts which were then hostile to the street car interests. Quigg's services consisted in forming these associations, providing counsel for them, circulating petitions to which millions of signatures were obtained, and appearing in Albany to advocate or oppose legislation (1396-1417, Sum. 59-65). Among the payments made to Quigg were large items for detective services (1401, Sum. 61), and to attorneys who appeared from time to time to sup

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port or oppose legislation (1472-1473, Sum. 70). Some of the things that Quigg said he was engaged in attempting to prevent were the proposal for a moving platform through 34th Street, the success of the so-called Belmont Tunnel Project, an elevated structure connecting the bridges from the subway, and he was also interested in preventing the third tracking of the Second and Third Avenues elevated structures (1453, Sum. 68). He also did publicity work and rendered advice to Vreeland and appeared in tax matters at Albany (1459-1463,

2279 Sum. 69).

Payments made by Quigg are set forth in detail at pages 1487-1511, Sum. 73-74). Out of $151,000 in payments made by Quigg from money received from the railroad $43,878 were cash checks to the order of McEvilly, Thomas and Coleman, associates of Quigg (1523, Sum. 75), and $10,000 for fees to Quigg, making an aggregate of $53,878 (1524, Sum. 76), as to which Quigg had no means of identifying the name of the persons to whom payments were made (1524, Sum. 76). Quigg said that he intentionally kept no record of the names

2280 of the persons to whom he paid money because he desired to suppress their names (1524, Sum. 76). Quigg able to account for $151,246, as against $218,807.77 paid to him by the Metropolitan Securities Company. At times he received money for which he gave no vouchers (1525-1526, Sum. 76). Quigg admitted pursuing lobbying activities in Albany (1540-1544, Sum. 77), but although he had obtained as he claimed the signatures of millions of citizens to his petition opposing the proposals of the Belmont interests the petitions were never presented but were suppressed after the merger was

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effected between the Street Railway group and the Belmont interests (1556, Sum. 77).

At pages 1414, 1417, Mr. Ivins spread upon the record a communication, dated October 2, 1907, which he had signed as special counsel to the Public Service Commission for the First District, to Adrian H. Joline and Douglas Robinson, Receivers of the New York City Railway Company, in which he said in part:

"You may have noticed the unsuccessful effort which I made yesterday to secure from 2282
the Metropolitan Street Railway Company certain returned checks and vouchers covering payments made on the Special Construction Account of that company. * * * I was not at all satisfied with Mr. Moorehead's explanation of his failure to produce all of the documents in question, nor should I think, if I may venture to say so, that his explanation as you will find it in the official minutes and as it is commented upon in the morning papers will be satisfactory to you as receivers.

I therefore beg to inquire whether or not 2283
you will be good enough as receivers to endeavor to secure the production of the documents in question before the Public Service Commission this afternoon either by causing Mr. Moorehead to produce them or by submitting them to me upon my receipt as has been the custom of the various companies from the beginning of the investigation.

In closing permit me to say that in view of Judge Lacombe's statement in his opinion handed down on the 30th ult. to the effect that—

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'All books in the custody of the receivers and all persons in their employ who may be called as witnesses, will, of course, be at the service of the commission'—

and in view of the unsatisfactory explanation made by Mr. Moorehead not only with reference to the non-production of these vouchers but also with reference to the destruction of the books of the Metropolitan Street Railway Company prior to 1902, I feel confident that
2285 any assistance which you may find yourself able to render the commission will not only be greatly appreciated by it but will also do much to relieve the public mind of its fear that the appointment of Federal receivers will have a tendency to delay the commission in its endeavors."

John B. McDonald testified that he went with the Metropolitan Securities Company after a misunderstanding had resulted between him and Belmont (1563-1564, Sum. 78), and he worked also
2286 with a syndicate consisting of Thomas F. Ryan, E. J. Berwind, Anthony N. Brady and Norman Ream.

McDonald made a contract with the Metropolitan Securities Co. on January 25th, 1906, by which he received from that company $150,000.00 to defray such expenses as he had incurred prior to January 1st, 1907 (1582-1583, Sum. 78), and McDonald received an additional $10,000.00 to reimburse him for a legal fee in that amount paid to Edw. M. Grout (1585, Sum. 78). In addition to the $160,000.00, above referred to, McDonald received $100,000.00 on February 1st, 1907, making a total received by him from the Metropolitan Securities

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Company of $260,000.00 (1585, Sum. 79), which sum was carried on the books of the Metropolitan Securities Co. to Property and Franchises Account, and, therefore, on its books, constituted an asset, notwithstanding that the entire scheme had been abandoned and McDonald had been settled with (1585, Sum. 79).

Meanwhile, the Interborough-Metropolitan merger had taken place, although McDonald disclaimed knowledge of whether this was a moving consideration for the abandonment of his relations with the Metropolitan Securities Co. (1588, Sum. 79). 2288
McDonald did, however, thereafter enter into a contract with the Interborough-Metropolitan Co. of which he was a Director and Vice-President at the time of the investigation, providing for the payment to him of $50,000.00 a year for five years, whether or not he rendered services. Up to the time of the investigation he had rendered no services (1589-1593, Sum. 79-80).

Under an agreement dated February 14th, 1902, between the Metropolitan Securities Co. and the Interburban Street Ry. Co., provision was made for the issuance of $15,000,000.00 of debentures which 2289
the Interurban Company was authorized to issue and which were sold at seventy, resulting in a discount of $4,500,000.00, which, up to 1906 continued to appear in the books of the company as an asset (1598-1600, Sum. 80).

Anthony N. Brady, President of the Wall and Cortlandt Street Ferries Railroad Co. (1601, Sum. 80-81), stated that he had bought the franchise, stock and bonds of the road with the intention of building, but that he had been dissuaded therefrom by Wm. Whitney, who pointed out that fric

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tion might result if Brady attempted to operate on this side of the river, with the result, according to Brady, that Brady decided to sell out to Whitney for $250,000.00 which was the cost of the securities to Brady (1613, Sum., 84). Brady claimed that he was in ignorance of the provision of the agreement between Kuhn-Loeb & Company and the Metropolitan Securities Company, whereby the Bankers, Kuhn-Loeb & Company agreed to use their best efforts to bring about a sale to the Securities Company of the issued shares and other securities of

2291 Brady's road among others (1614, Sum. 85). Brady retained ownership of the road for about two years, but although he stated that he received only $250,000.00 for the securities he admitted, when a check of the Metropolitan Securities Co. dated May 22nd, 1902, for $965,607.19 was shown to him, that he had received it and also identified the vouchers accompanying it, showing that the check was given in payment of Brady's $1,000,000.00 of stock and $1,000,000.00 of bonds of the Wall and Cortlandt Street Ferries Railways Co. (1615, Sum. 85). Brady insisted, however, that all that he got

2292 out of the $965,607.19 was $250,000.00 and that the balance of about $715,000.00 he paid out by his own checks as follows:

$134,028.92 to Moore & Schley, who it will be recalled, credited this check to the account of Wm. C. Whitney according to the testimony of Schley, and $111,652.78 each by checks to the order of Wm. C. Whitney, Thomas F. Ryan, Thomas Dolan, P. A. B. Widener and Wm. L. Elkins (1615-1617, Sum. 85-86). The item of $965,607.19 was carried on the cash book of the Metropolitan Securities Co. against Property and Franchise Account, constituting the largest single item in that account (1617,

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Sum. 86). The history of this road for which the Metropolitan Securities Co. thus paid $965,607.19 of which only $250,000.00 was retained by Brady, was briefly that it was organized in 1885 with an authorized capital of $700,000 (1602, Sum. 81), and that between that date and 1888 no report was made to the street railway commission, and that in 1892 there appears in the report mention of a funded debt of $450,000 in addition to the $700,000 capitalization.

In 1894 it appears that the capitalization was $687,700 and the funded debt $500,000 and the 2294
cost of road and equipment $1,887,700 (1602, Sum. 81), although neither at that time nor at any subsequent time had any work of construction been done pursuant to the franchise which roughly ran from the foot of Wall Street East River, to the foot of Liberty Street North River, traversing important streets like Wall, Pine, William, Liberty, Cortlandt, and Fulton Streets as well as Broadway (1602, 1605, 1606 Sum. 82-83).

In 1895 the first report of the road was filed and that showed a capitalization of $700,000 consisting of seven thousand shares, par value of $100 of 2295
which 6,877 had been issued, seven for cash at par, and 6,870 on account of construction. So that the cash realized on the stock was $700 and the funded debt $500,000 although no road had been built or commenced (1602, Sum. 81).

In the 1898 report Patrick Keenan appears as president of the company and in the 1899 report the capitalization is given at $1,000,000 and the funded debt of $1,000,000 and of the capitalization sixteen shares had been issued at par for cash, being a total of $1,600 and 9,984 shares issued for property of the old company. The president in this year is

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given as A. N. Brady. The company from year to year failed to file reports as required by law and it appears that in 1897 the road was sold under a judgment of foreclosure the purchaser at the foreclosure being Joseph V. Donald (1603, 1606, Sum. 82, 84).

No explanation appears in the record of the Ivins' Investigation of the circumstances that justified the division of the $700,000 surplus above the $250,000 retained by Brady, among the directors of the Metropolitan.

2297 Marvyn Scudder attempting to reconstruct the books of the Metropolitan Street Railway Company, the sub companies of that company, the New York City Railway Company, and the Metropolitan Securities Company, found that in addition to the salary of $25,000 per year subsequently raised to $40,000 a year which had been paid to H. H. Vreeland, he had received from these companies as shown by vouchers which could be found $113,316 and as appeared but as to which vouchers could not be found $185,249.06, making an aggregate received by Vreeland over and above his salary from
2298 these companies of about $300,000 (1618-1621, Sum. 87-88).

Among the items of payments made to Vreeland there was identified by Edward W. Sayre, of the New York City Railway Company a check for $66,000 to the order of Vreeland of which $65,000 according to Sayre represented Vreeland's salary, and the additional $1,000 was a reimbursement to Vreeland for a call amount paid by him on a call for ten per cent. on his subscription to the stock of the Interstate Tunnel Company of New Jersey, one of the enterprises in which McDonald was engaged. This $1,000 was charged against the

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property and franchise account of the Metropolitan Securities Company (1623 Sum. 88).

Sayre also identified a voucher showing a payment to Thomas F. Ryan of $24,000 on June 9, 1903, entered in the Ledger Account of "Undistributed Items." Sayre was unable to say for what purpose this money was paid to Ryan and why it had never been collected from Ryan or charged to Ryan, but he did know that as Treasurer of the company he drew the check by order of the president (1623-1624, Sum. 88-89).

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Sayre also identified a check for $25,000 dated August 26th, 1904, to the order of Charles A. Conant, which it appeared was drawn by Sayre at the order of president Vreeland of the company to repay Conant for a loan made through Conant to Thos. C. Quin of the New York Daily News. Quen's name was nowhere indicated in the transaction and Sayre did not know why the loan was made to Quin, but he did know that it had not been repaid by Quin. The company received no notes as evidence of this loan until February, 1907, although the loan was made to Quin in August, 1904 (1625-1626, Sum. 89-90).

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Sayre admitted charging to property and franchise account two payments aggregating $4,500, made by the Metropolitan Securities Company to one Little for services as advisory expert accountant although Sayre knew of no reason why they should be charged to property and franchise account thus appearing as assets.

Sayre identified a voucher showing a payment of $33,100 to William N. Cohen, and as appeared by the correspondence the payment to Cohen was made for 200 shares of Metropolitan Street Railway Company at 165½ which represented to be the

2302 price paid for the stock on February 7, 1902, apparently by a client of William N. Cohen (1628-1629, Sum., 91).

Sayre identified vouchers for two payments of $5,000, each to J. Sergeant Cram for a "Retainer in legal services," at any rate that is what Vreeland told Sayre was the purpose of the payment (1629-1630 Sum., 91-92).

The $5,000 payments to Cram and the $24,000 payment to Ryan were each charged against property and franchise account (1630, Sum., 92).

2303 Sayre identified a voucher register entry showing payment to Daniel F. Cohalan of $5,000, which was carried to Investment Account (1631-1632, Sum., 92).

Sayre identified a check to the order of the Standard Trust Company for $28,500, entered in the Undistributed Account, which had never been charged to the Standard Trust Company nor collected from it. Sayre had received the draft of the Standard Trust Company but delivered it to Thomas F. Ryan, to whim he had been instructed to give it by Mr. Vreeland. The payment to Ryan

2304 was supposed to have been for disbursements incurred by Ryan on behalf of the Metropolitan Securities Company but Ryan supplied no vouchers for any of these disbursements and he was an officer and director of the Metropolitan Securities Company at the time (1632-1634, Sum., 92-93). Mr. Cravath stated that the money had been repaid but it did not appear by whom it was repaid (1634, Sum., 93).

Mr. Ivins offered the minutes of the Metropolitan Securities Company in evidence for the purpose as he stated of showing "How minutes are not kept." A typical set of such minutes consisted of

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a statement of the date of the meeting, the persons present, and some such general statement as the following: "General matters of interest pertaining to the affairs of the company were discussed. The meeting then adjourned" (1650, Sum., 93).

Sayre identified three checks for $5,000, each to the order of August Belmont and charged to "Miscellaneous general expense" which according to the correspondence set forth in the record which Sayre identified, were collected by Belmont "As a special contribution on behalf of the interests represented by this company to the fund for the investigating 2306
of questions connected with the municipal ownership and operation" which investigation was conducted by the National Civic Federation of which August Belmont was president. The checks were drawn to the individual order of Belmont (1656-1660, Sum., 93-95). The stockholders of the Metropolitan Securities Company never voted to make these payments nor were they informed that the disbursements were being incurred. The payments were carried to general expense account and Sayre said he did not know why the checks were made to the order of Belmont personally, but he did re- 2307
member that Vreeland directed him to make the payments (1660-1661, Sum., 95).

Sayre identified a check dated April 22, 1904, to the order of Morton Trust Company for $37,492.56, which was carried in suspense account with no voucher attached showing what the payment was for and the amount was so carried from 1904 to the time of the investigation (1662-1664, Sum., 95).

Sayre identified a bundle of checks aggregating $28,836.28, practically all payments made to one MacDona who performed services usually performed by a press agent and these payments were

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charged to property and franchise account (Sum., 96).

Examination of the property account of the Metropolitan Securities Company and other accounts of the same company show that they paid between February 17, 1902, and September 23, 1907, to lawyers, an aggregate of $916,438.68 (1684, Sum. 99). The books of the New York City Railway Company and the Metropolitan Street Railway Company for the same period show additional payments to counsel of $238,277.66, making a total of payments to counsel by the Metropolitan Street Railway system during the period of $1,154,666.34 not including the accident account (1684, Sums., 99-100).

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Because of the destruction of the books of the Metropolitan prior to April 30, 1902, Marvyn Scudder attempted to reconstruct the lost books by entries found in other books, particularly the stubs on the different banks (1696-1697 Sum. 101). From the entries in or upon the stubbooks, Scudder was able to testify that the payments enumerated by him were charged to one or the other of the accounts as indicated (1698-1718, Sums. 101-105). Among these payments were found vouchers aggregating $154,300 representing payments to the Morton Trust Company for securities of the Metropolitan Street Railway Company paid under the orders of President Vreeland through Thomas F. Ryan (1716, Sum. 104-105). Sayre in each of these cases of purchases made through A. A. Ryan & Bro. drew the checks by order of Vreeland (1716-1718, Sum. 105).

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Sayre's attention was called to the fact that of two checks drawn to the order of Cash, one on

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October 21, 1902, was made at a time when there was pending an important election in the City of New York not only for the local officers of alderman and members of assembly but for Governor of the State, the opposing candidates then being Coler and Odell, and the aggregate of these check being $540,000, which were charged to investment account 1718-1719, Sum. 105-106). Asked what this money was for Sayre stated that it was for some special disbursements in respect to the purchase of certain claims against the Wall and Cortlandt Street Ferries Railway Company, or at any 2312
rate that was what Vreeland told Sayre the payments were for (1719, Sum. 106). The voucher endorsement showed that the check was drawn to the order of Charles E. Warren and distributed to investment, whereas the check was in fact drawn to the order of cash. When Sayre was asked whether Warren if sober could explain what was done with this money he replied that he did not think Warren could but he did believe that Warren handed the money to Vreeland. Sayre said he did not know who got the money from Vreeland (1720, Sum. 106). 2313

Similarly Sayre did not know what had happened to $5,000 shown by a voucher to have been drawn out on a cash check and charged to investment account except that the money was handed to Vreeland. He did not know what Vreeland did with the money (1720, Sum. 106-107).

Sayre produced under subpoena a check for $250,000 dated October 12, 1900, drawn on the Morton Trust Company payable to the order of the Metropolitan Street Railway construction account. This check signed by Vreeland and Charles

2314 E. Warren was not drawn from a perforated checkbook but apparently from a private pocket checkbook and was endorsed "Metropolitan Street Railway Co., by H. H. Vreeland, president, Charles E. Warren, Secretary" but there was no entry on the check or on the checkstub of any reference to the transaction in any of the documents in existence at the time of the investigation to indicate why the check was drawn although Sayre stated that he thought Vreeland or Warren could tell this. Incidentally this check for
2315 $250,000 was drawn in the Fall of the year of a presidential election (1721-1722, Sum. 107).

Grant B. Schley testified that the check for $134,028.92 made to the order of Moore & Schley by Brady part of surplus over and above the $250,000 which Brady claimed was all that he retained out of the $965,607.19 check of the Metropolitan Securities Company to Brady on the Wall and Fulton Street deal, was credited to the account of William C. Whitney who carried an account with Moore & Schley (1784, Sum. 108). Schley testified concerning accounts conducted by
2316 the Metropoplitan Street Railway Company with Moore & Schley under various designations. One account entitled the "H" account showed purchases of Third Avenue Railroad Company stock aggregating $6,585,070.36 (1787-1788, Sum. 108). These stocks were purchased under the direction of Whitney and Vreeland and daily reports were rendered to Vreeland who was president at the time (1788, Sum. 108). Notwithstanding that the aggregate of purchases as shown by Moore & Schley's records was $6,585,070.36, principally of Third Avenue Railroad Company stock, the books

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of the Metropolitan show that payments were made to Moore & Schley aggregating $7,667,032.10 (1791, Sum. 108-108). Other accounts carried by Moore & Schley for the Metropolitan were designated "S H. No. 1" showing aggregate purchases of $88,249.06, which account had formerly been conducted by Whitney but had been transferred by him to the Metropolitan Street Railway Company at the price at which he had bought the stock (1792, Sum., 109). Also an account entitled "M. C." aggregating $176,498.18 (1793-1794, Sum., 109). Another account was designated 2318
"Metropolitan Street Railway Company" and showed the transactions aggregating $943,046.96 (1794-1795, Sum., 109-110).

Fred C. Cocheu called as a witness testified about the deal in which he was interested with Patrick H. Flynn, Michael J. Coffey, James Shevlin and John Keenan. They formed a syndicate to purchase the Peoples Traction Company, the New York, Westchester & Connecticut Traction Company, and the North Mt. Vernon Street Railway Company (1799, Sum., 110). The syndicate paid $150,000 for the Peoples Traction Company 2319
and purchased the North Mt. Vernon Street Railway at foreclosure for $16,000 (1799, 1800, Sum., 110). The syndicate also had what Cacheu described as a trusteeship, for which it paid nothing, over the Edenwald Street Railway Company. These properties were turned over by Cocheu's syndicate to one Robert S. Bussing in 1902. The syndicate had been acquiring franchises since 1898 in Westchester with the object of extending the system out to the Connecticut line (1801-1802, Sum., 110-111).

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At the stockholders' meeting of the Interurban Street Railway Company in November, 1901, at which the company was organized and in which Cocheu's name appears as one of the incorporators substitutions were made and the resignations of Cocheu and his associates were accepted, the syndicate associates thereby stepping out of the Peoples Traction Company, The New York, Westchester & Connecticut Traction Company and the North Mt. Vernon Traction Company (1802-1803, Sum., 111). The actual negotiations for the sale by the syndi-

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cate to Whitney were had by Flynn, who, as Cocheu said, was "Captain of the ship." It will be recalled that the syndicate had acquired the Peoples Traction Company for about $150,000. By the Bussing contract of February 14, 1901, they sold it for $1,600,000 of which about $1,000,000 had been paid at the time of the investigation and there was a dispute as to the $400,000 or $600,000 still owing (1804, Sum. 111). Flynn procured a loan of $200,000 from Kuhn, Loeb & Co., on the credit of the syndicate's interests in the contract so that in addition to the $1,000,000 received by

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the syndicate in cash, $200,000 was paid to Flynn by way of this loan (1806, Sum., 112). But when Cocheu was asked whether the loan had ever been repaid he said that he knew that Flynn had not repaid it but he did not know whether other people had paid it. Cocheu as a member of the syndicate received no part of that $200,000 (1806, Sum., 113). At the time of the sale of the syndicate's properties to the Interurban Company for $1,600,000 the only thing that the company had over and above the unexercised franchises by way of assets was a road in operation from the station at the

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City of Mt. Vernon up through Lincoln Avenue and out towards White Plains for some distance, and at points of vantage they had twelve to fifteen hundred feet of road laid so that no other road could come in and cut them out. The syndicate also had two or three cars and a carbarn all of which had been taken in the purchase price of $16,000 for the North Mt. Vernon Company (1807, Sum., 113).

2324

Defendant's Exhibit "U."

COMPENDIUM

OF

GRAND JURY INVESTIGATION

regarding the stockholders' committee, etc., of the Metropolitan Street Railway Company, January 24, 1908.

Mr. Jerome addressing the Grand Jury stated that the presentment had been found "That there was a general and widespread belief on the part 2325
of the citizens of this community that very serious crimes had been committed in connection with the public service corporations and traction companies and financial institutions, and this being a great commercial city if such crimes had been committed, they were much more serious to the community generally than the ordinary run of time; they should be sought out and whoever had permitted such crimes should be punished for it, and if the law was inadequate, the legislature now being in session, those laws should be amended to confer

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abolute protection" (pp. 5-6). A dialogue then ensued between Franklin Pierce, attorney for the Citizens' Committee of persons interested in traction matters regarding the course to be pursued in conducting the investigation. It was Pierce's claim as embodied in a letter addressed to the Grand Jury that Jerome should be superseded by another attorney who had a more open mind, for as Mr. Pierce stated "The conviction that a man is guilty is a condition precedent to the conviction of any man, and I think my friend will agree with
2327 me on that. Now whether it be wrong or be right, there is an impression abroad that Mr. Jerome does not believe that these men are guilty" (pp. 6-12). To which Mr. Jerome responded "Let me correct that impression right here. I have iterated and reiterated ad nauseum my belief in the fact that they are guilty" (p. 12).

In the course of the dialogue, Pierce suggested that a special assistant be appointed as to which Mr. Jerome stated the law conferred no authority upon him (pp. 13-14).

Pierce suggested that a prosecution be instituted
2328 against Moorehead and the others who were responsible for the destruction of the books, to which Mr. Jerome responded that Moorehead was protected by Section 20 of the Public Service Commission Act which conferred absolute and complete immunity upon him in consideration of his having testified before the Ivins' Investigation (pp. 14-15). Jerome added that nobody else could be prosecuted because Moorehead and everybody else had asserted that Moorehead acted without instructions from anybody else (pp. 15-16). Pierce, however, insisted that correspondence could be brought forward which would show that Moorehead acted

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on instructions (p. 16). In the course of the discussion, Jerome stated "Everybody concedes that Moorehead lied before the Public Service Commission. Everybody concedes that Moorehead had a criminal intent in doing it. Don't you see that Section 20 grants immunity" (p. 16). Pierce then suggested a prosecution based on the flotation of the Metropolitan Securities Company by which Kuhn, Loeb & Co. received $1,500,000 to float the securities (p. 20), to which Jerome replied stating that the matter had been investigated and found to contain no elements of a crime (pp. 20-21). Pierce then suggested that a criminal prosecution be instituted against Ryan, Widener, the other Philadelphia directors, and Vreeland, who, in violation of the by-laws of the company, acted as an executive committee and carried out the whole transaction and formed the Metropolitan Securities Company to which Jerome made no reply (pp. 21-22).

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Pierce then suggested that a prosecution be instituted by reason of the fact that millions and millions of dollars were charged as the cost per mile for the change of some of the crosstown roads from horse railways to electric railways, to which Jerome replied that there were mitigating circumstances such as bookkeeping entries which explain the apparently excessive charges (pp. 22-23). Pierce then referred to the matter of the Wall and Cortlandt Street Ferry franchise and stated: "There is sufficient (evidence) mountain high, and a lawyers that could not convict under the law ought never to try another case in God's world" (p. 23), to which Jerome replied that the men who participated in the Wall and Cortlandt Street

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franchise had gained immunity by the provisions of the Statute of Limitations (p. 24). Pierce then suggested that they be prosecuted for conspiracy to which Jerome stated an indictment would not lie (pp. 24-26).

William M. Ivins, examined by Mr. Jerome, testified. He reviewed in a general way the testimony elicited by him upon the Public Service Commission's investigation and in the course of his testimony was asked the following question and made the following answer:

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"Q. Let me ask you, Mr. Ivins. Mr. Moorehead testified in regard to the destruction of these books. Mr. Moorehead swore as I recall it distinctly that the books were destroyed without any suggestion from any other individual. Of course, considering Mr. Moorehead's relations in the company, his subordinate position, nobody who heard that testimony believes it.

A. Well, I have got four folios of Shakespear at home and if my servant would swear

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that she had burned those four folios of Shakespear without any instructions and had done it quite of her own will in order to make room for some Saturday Evening Posts in my bookcase, I do not think anybody would believe it" (pp. 155-156).

Ivins testified "Those books were destroyed but at the time of their destruction, they were no longer in use, a new set of books having been opened. This is as I understand it. Now, so far as that new set of books is concerned, Mr. Scudder of whom you spoke has been at work on those with an as-

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sistant to the extent to which he has been able to work at all in view of the fact that three or four different sets of accountants wanted the same books at the identical moment. * * * I understand why a man may desire to destroy the records of transactions that he does not want too closely scrutinized, but I don't understand his saying they had been destroyed and nevertheless keeping them under such circumstances that the very result that he has tried to prevent may nevertheless happen" (p. 166).

End of discussion as to manner of conducting 2336
investigation and proof to be adduced to convict the persons liable of offenses.

February 17, 1908.

Paul D. Cravath, examined by Mr. Jerome, testified that the reason the Metropolitan Securities Company bought from a client of Judge Cohen about one hundred shares of stock of the Metropolitan Street Railway Company was that Judge Cohen came to Cravath and stated that his client who had paid about 160 for the stock was dissatisfied and contemplating commencing an action against the Metropolitan Securities Company by 2337
reason of the merger that had just gone through. The market price of the stock was then 105, but Judge Cohen said that his client, who was very litigious, would bring suit unless his stock was bought for 160 "And after becoming satisfied that unless that stock were bought, we would have a very troublesome litigation, I decided to advise the company to comply with Judge Cohen's terms and buy the stock especially because Judge Cohen said that if that stock were bought, he would not enter into any other litigation of that character against the Metropolitan Company. * * * I knew

2338 that if Judge Cohen started a law suit at that time, it would invoke other law suits and it was bad policy to have litigation when no other law suits were in sight, and I thought it was cheaper to buy the stock at 160 a share than to have a law suit and I so advised and bought the stock" (pp. 80-81). * * * "We had a large debt and any kind of a law suit at that time would have made it difficult to carry through the financial plans I knew were in contemplation" (p. 82).

2339 Other witnesses called whose testimony was practically entirely a repetition of that given either in the Ivins' Investigation or in the first Grand Jury Investigation (1907) were Arthur W. Teele, who testified, pages 197-299. H. H. Vreeland who testified, pages 300 to 408 and pages 415 to 560, and Joseph A. McGregor, who testified, pages 409 to 415.

March 30, 1908.

2340 Thomas F. Ryan, recalled, asked permission to read a statement to the Grand Jury concerning the accusations made against the management and directorate of the Metropolitan Street Railway Company which charges he said might be summarized as follows:

"1. That the stock of the company consists chiefly of water.

2. That enormous profits were made by so-called insiders through construction contracts and otherwise.

3. That after the purchase by the Metropolitan Securities Company of the Wall and Cortlandt Street Railway, the insiders appropriated $111,000 each to his personal use. Each of those is false" (pp. 561-564).

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Ryan then took up each of these charges in order reading from his memorandum (p. 564) and being cross-examined thereon (pp. 567-637). His testimony was practically a repetition of his testimony before the 1907 Grand Jury.

Quigg was recalled and testified (pages 634-643) practically to the same effect as his previous testimony about the envelope containing the twenty-one thousand dollar bills being carried by him to Odell.

John B. MacDonald recalled, testified (pages 644-660).

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Anthony N. Brady, testified again (pages 660-676), substantially to the same effect as his previous testimony.

D. Clifford Moorehead, recalled, reiterated his testimony (pages 676-680), as to his having ordered the destruction of the books. He protested that he did so absolutely upon his own volition and without either conference or consultation with any officers, directors or employees of the company relating thereto (page 677).

A. D. Juilliard, a member of the Board of Directors of the Metropolitan Securities Company at the time of the Wall and Cortlandt Street Ferry deal in 1902, testified that he knew nothing about the transaction other than that he voted for the acquisition of the four franchises of which the Wall and Cortlandt Street Ferry was one for $2,500,000.

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The testimony of Thomas P. Fowler, likewise a director at the time, was similar in substance and effect except that he added that he signed the $965,000 check as president of the road (pages 686-689).

Similarly Edward J. Berwind, who testified at pages 690 to 692.

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Allan A. Ryan testified (pages 693-697) to commissions earned by his firm, A. A. Ryan & Brother, in the purchase of stocks for the account of the Metropolitan Securities Company.

Sayre, recalled, testified (pages 698-734) substantially to the same effect as his previous testimony in the previous Grand Jury and Ivins' Investigation.

George S. Bixby, a lawyer, testified (pages 735-753) stating that although his name appeared as the vendor of the four franchises including three
2345 in the Bronx and one the Wall and Cortlandt Street Railroad Company he stated that he was not the actual owner of any of those but merely acted as a trustee for someone whose name he did not recall (pages 735-739), in substance and effect admitting that he was a mere dummy acting under the direction of William H. Page, Jr. (pages 744-745), asserting later, however, that he believed that Page was acting for a client who owned the stocks and bonds of the railroad (page 751).

Sayre, recalled, testified (pages 754-757) to mat-
2346 ters which had substantially been covered in the previous investigation.

Charles S. Ludlam, certified public accountant, of the firm of Haskin & Sells, testified (pages 758-784) to the reason for charging off various payments made by the road against certain accounts.

Jerome read into the record before the Grand Jury a letter addressed to him under date of February 10, 1908, by John C. Hertle, who, it will be recalled, had made an accountant's report on the Metropolitan Street Railway Company at the request of Colonel Amory (pages 785-790).

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Quigg, recalled, testified (pages 791-792) to matters of no great materiality.

William H. Page, testified (pages 793-794) that he had no facts or figures that would throw any light on the Wall and Cortlandt Street Ferries Company transaction though he admitted that Whitney was his client in 1902. He had, however, he said, never heard anything about the sale of the road (pages 793-794).

William N. Cohen, testified (pages 795-800), in substance and effect to the same transaction as had Mr. Cravath, i. e., the purchase by the Metropolitan Securities Company of about one hundred shares of Metropolitan Street Railway stock at 160 to avert threatened litigation by Cohen's client.

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William Travis Jerome, testified (pages 801-802), denying the truth of the allegation by Amory "That the District Attorney knew of the destruction of the books of the Metropolitan Street Railway Company in 1904 and neglected to act though such destruction was a crime."

H. H. Vreeland recalled, testified (pages 803-804), that he advanced sums of money aggregating approximately between four and five hundred thousand dollars sometime prior to January 1, 1900, to William C. Whitney at Whitney's request. Whitney informed him that the moneys were to be used for political purposes for the advancement of the interests of the Metropolitan Street Railway Company. Subsequently the Metropolitan Street Railway Company was reimbursed for these moneys advanced, (page 803). The Metropolitan Street Railway Company was reimbursed by Mr. Whitney who "turned over the money in the shape

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2350 of checks; a check or checks, I don't know which it was endorsed to my order" (page 804). Vreeland was then asked whether part of the reimbursement was in current funds upon Philadelphia and he admitted that that was his information, that it was by a draft endorsed by George Huhn & Sons (page 804).

George A. Huhn, a Philadelphia broker, testified (pages 805-807) from a transcript of the books of his firm, George A. Huhn & Sons in 1900 that on January 20, 1900, his firm received from New
2351 York 3,500 shares of Electric Storage stock and also received checks of $100,000, each from five different parties, i. e., Whitney, Ryan, Elkins, Widener and Dolan, with instructions to get checks from Elkins, Widener and Dolan "in exchange for these, and to remit to New York altogether $755,000" (page 806). That thereafter his firm sold the storage stock for $255,000, which proceeds together with the five other checks Huhn testified he brought to New York and delivered to Whitney. He recalled that the delivery was to Whitney personally for he stated he would not have delivered
2352 it to anybody else except Whitney without a voucher. The delivery to Whitney was in the shape of Huhn's checks for $355,000 and a draft on New York for $400,000. Huhn endorsed the checks and draft at Whitney's direction to Mr. Vreeland who received the aggregate amount of $755,000 on January 20, 1900 (page 807).

Testimony closed.

Defendant's Exhibit "V." 2353

COMPENDIUM OF

1. Communication received by the Board of Estimate and Apportionment.

2. Communications received by the Comptroller.

3. Communications received by the Mayor.

4. Publications in the press of the City of New York.

All relating to matters set forth in the alleged 2354
contemptuous communication.

Also abstract from a memorandum of Judge Mayer, dated December 27th, 1919, which, while written after the date of the alleged contemptuous communication, reflects conditions existing on that date.

COMMUNICATIONS RECEIVED BY BOARD OF ESTIMATE AND APPORTIONMENT.

Read at Meeting, July 12, 1918.—Communication from Winfield A. Haller, president, Haller 2355
Car and Locomotive Corporation, stating that by the adoption of modern efficient equipment and the use of modern appliances the gross earnings of street railway companies can be materially increased and the operating expenses decreased to the extent of at least 40 per cent., and submitting figures purporting to show how this gain may be reached.

July 19, 1918.—Communication from Abe Alprit in opposition to increase of fare by New York Railways Company.

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July 19, 1918.—Communication from Central Federated Union of Greater New York and vicinity, protesting against increase of fare on subway, surface and elevated lines.

July 19, 1918.—Communication from Maurice Segall, Irving Schwartz and Harry Segall, protesting against any increase of fare on the lines of the Brooklyn Rapid Transit Company.

Sept. 20, 1918.—Communication from Ernest
2357 Bohm, corresponding Secretary, Central Federated Union, requesting Board to hold hearings at night on petitions to increase fare, so that the workers may be heard.

Asked for hearings at night "so the men and women who will have to pay the increased fare may be heard."

Sept. 20, 1918.—Communication from Hon. B. C. Vladeck, Alderman, 56th District, presenting figures showing net profit of Brooklyn Rapid Transit System and alleging the figures are
2358 sufficient proof that no more revenue is necessary for the operation of the lines.

Read at Meeting, Sept. 20.—Thirteen (13) protests from Flatlands Property Owners Association, Joseph Newman and others, against the application of Brooklyn Rapid Transit Company for an increase of fare.

Sept. 20, 1918.—Communication from H. P. McGovern and William N. Amory against increase of fare on street railways in New York City.

2359

Sept. 20, 1918.—Communication from Henry Nordheim in protesting against increase of fare on New York Railways Company's lines.

Oct. 18, 1918.—Communication from Edwin Markham, from General Manager, Johnson Shipyards and from E. J. McCort, President, McCort Bros., Inc., in opposition to the joint application of the Richmond Light and Railroad Company and the Staten Island Midland Railway Company for an increase in fare from five to seven cents. 2360

Sept. 26, 1919.—Communication from Central Federated Union of Greater New York and vicinity against charge for transfers or increase in fare on transit lines of the City.

COMMUNICATIONS TO THE COMPTROLLER.

Jan. 13, 1919.—Letter from New York Board of Trade and Transportation, 203 Broadway, enclosing copy of resolution regarding the transit situation.

Resolution to form representative body of commercial and civic organizations to make representations on behalf of people to the authorities to avoid possible disaster. 2361

Resolution that service cannot be properly continued unless revenue from fares is sufficient.

Jan. 25, 1919.—Letter from John Finck, real estate operator, 198 Broadway, enclosing statement of views on transit situation, and stating that said statement had been mailed to the

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public press and leading authorities and administration officials.

Fare should be increased and transit companies should make fair and reasonable concessions.

Jan. 24, 1919.—Letter from Richard C. Harrison, secretary of the City Club of New York, 55 West 44th Street, enclosing communication addressed by the City Club to Mayor Hylan on the transit situation. This statement registered a protest against granting of an increase in fare.

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Jan. 24, 1919.—Letter from George M. Rafter, 261 Washington Street, New York, protesting against the alleged unfairness of the City officials towards the bondholders and stockholders of the transit company.

Jan. 28, 1919.—Letter from Independent Club of the West Side (A. P. W. Seaman, 60 Broadway), requesting that the Speaker from the Comptroller's office attend a dinner to be given by the Independent Club for the discussion of the transit situation, and that several hundred pamphlets be sent for distribution.

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Mr. Shonts and Judge Ransom were to attend and speak.

Jan. 22, 28 and 30, 1919.—Letters from John Adikes, chairman of the Transit Committee of Queens Chamber of Commerce, Jamaica, L. I., asking for information with regard to the transit situation so that the Chamber might act upon the same.

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Feb. 4th, 1919.—Printed Preliminary Report of the Local Transit Committee of the Brooklyn Chamber of Commerce. The first paragraph of this report reads as follows:

"The receivership of the Brooklyn Rapid Transit Company and the probable bankruptcy of other transit companies present a most serious situation. Its continuance without the prospect of a constructive plan of relief will, through the bankruptcy of the other lines, result in heavy financial losses not only to the 2366
companies but also the City through its investment in the dual system, will reduce and impair service which will affect every interest of the public and will cause hardship and widespread industrial disturbances."

And later in the report says:

"These past sins of company mismanagement have other and wider effects. With the resulting bad service and collisions between public and private interests, the public believes 2367
and with large justification, that the companies have no real end in view but to exploit the public. The public at large, therefore, has no confidence in the statements of the companies nor in their good faith."

Feb. 1, 1919.—Letter from Charles F. Noyes, Real Estate, 92 William Street, regarding the transit situation.

Suggested that a "self-sustaining" rate of fare be allowed the traction companies in order to protect City's investment and to prevent loss to taxpayers.

2368

Mar. 3, 1919.—Letter from Joseph F. Seitz, Real Estate, 767 Lexington Avenue, New York, with respect to the transit situation.

Suggested that fare be increased.

June 14, 1919.—Letter from W. W. Conley, Manager of the Reo Chemical Company, 79 Barrow Street, New York, requesting information with regard to the transit situation.

Inquired whether if there should be a default on the I. R. T. 5s, would the city pay

2369 the coupons.

Asked for leaflet showing city's financial obligations in respect to transit situation.

Oct. 14, 1919.—Letter from the Brooklyn Chamber of Commerce, 32 Court Street, making suggestions as to the solution of the transit difficulty. This letter read in part as follows:

"Despite all efforts that may be made to minimize them, the disintegration of lines that have been operated as a whole for a generation or more will make more confusion and

2370 hardship to the traveling public and to the business interests of the borough."

Dec. 17, 1919.—Letter from the Public Committee on Transportation, 141 Broadway, requesting that the comptroller appoint three gentlemen as members of this committee, and enclosing statement of the Terminal Ports Association regarding the necessity for the appointment of such a committee.

The Statement of the Terminal Ports Association suggested "service-at-cost" plan. Said

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Committee referred to should be formed, for the purpose of discussing and formulating plans for relief.

Dec. 30, 1919.—Letter from the Flatbush Taxpayers Association of Brooklyn (F. Cornelius Wandmacher, Executive Secretary, 1290 New York Avenue, Brooklyn), forwarding resolutions adopted at a meeting of the association. These resolutions included the following statement:

"1. The present confusing and damaging 2372
condition of transit in this City, especially in the Borough of Brooklyn, demands immediate action on the part of officials and the properly constituted authorities."

COMMUNICATIONS RECEIVED BY MAYOR HYLAN.

Jan. 2, 1919.—Letter from Albert Lange, 118 East 82nd St., commending the Mayor for opposition to increased fare.

Jan. 2, 1919.—Letter from R. D. Smith, Reading, 2373
Pa., protesting against decrease in value of the stocks and bonds of the transit companies.

Jan. 4, 1919.—Letter from Geo. A. Young, Washington, D. C., advocating taking over of roads by city. Says he owns $600,000 of N. Y. Rys. Bonds.

Jan. 6, 1919.—Statement from J. C. Van Alstyne, 71 Murray St., New York, with suggestions as to solution of transit difficulties.

Suggest Zone System.

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Jan. 6, 1919.—Letter from John Van Sickle, 140 Genesee St., Auburn, N. Y., requesting that the companies be allowed an increase in fares.

Jan. 7, 1919.—Letter from M. McKeon, 101 East 95th Street, N. Y., protesting against increase in fare.

Jan. 8, 1919.—Letter from W. H. Moore, 1419 Pacific Street, Brooklyn, N. Y., protesting against conditions on the B. R. T.

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Jan. 10, 1919.—Letter from F. Marsh Soper, M. D., 110 W. 34th St., N. Y., protesting against granting of any increase of fare.

Jan. 10, 1919.—Letter from John J. Wynne, 23 East 41st Street, N. Y., advocating graduated fares as a solution.

Jan. 13, 1919.—Letter from Oscar Mayer, 2085 Fifth Ave., N. Y., protesting against transit conditions.

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Recommending that the traction companies be granted a "fair increase" in fares.

Jan. 22, 1919.—Letter from Carl Thal, Milwaukee, Wis., protesting against decrease in value of stocks and bonds.

Jan. 24, 1919.—Letter from Wesley Wait, Newburgh, New York, protesting against transit situation.

Stated that City had no authority to divest public funds to make good deficits of traction companies.

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Jan. 26, 1919.—Letter from M. W. Palmer, 521 West 111th Street, N. Y., protesting against conditions.

Requested that companies be forced to establish through local service from Times Square to lower Fourth Avenue.

Jan. 29, 1919.—Letter from Joseph R. Seitz, 767 Lexington Avenue, New York, requesting that the Mayor grant increase in fare to relieve the situation.

2378

Feb. 1, 1919.—Letter from Chas. F. Noyes, 92 William Street, N. Y., with suggestions for solution of transit difficulties.

Suggested that a "self-sustaining" rate be given the transit companies.

Feb. 5, 1919.—Letter from George D. Miller, 174 South 7th Avenue, Whitestone, N. Y., protesting against any increase in fare.

Feb. 14, 1919.—Letter from J. Henry Small, 1326 Bergen Avenue, Brooklyn, protesting against transit conditions. 2379

Cars on Bergen Street line are too few, and conductors do not announce streets.

Feb. 26, 1919.—Letter from F. Sielern, 255 West End Avenue, New York, requesting that the Mayor grant increase in fare.

Feb. 28, 1919.—Letter from Wesley Wart, New York, protesting against transit situation, stating that the Mayor's reply to his previous communication was unsatisfactory.

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March 22, 1919.—Copy of letter from Mary A. Lennon, 311 West 24th Street, to Travis Whitney, P. S. C., approving stand of the Mayor.

March 23, 1919.—Letter from Chas. V. McKeon, 622 7th Street, Brooklyn, commending Mayor on his stand against increased fare and suggesting plan.

March 27, 1919.—Letter from Mrs. E. D. Prendergast, 419 West 118th Street (stockholder),
2381 protesting against situation.

Stock bought for $150, now selling for $13.

Asked the Mayor to "form some plan by which we shall receive justice."

April 4, 1919.—Letter from Herman A. Metz, 122 Hudson Street, enclosing copy of report of Brooklyn Chamber of Commerce.

"The position of the Chamber is this: Scrupulously fair treatment of the transit companies by the public in return for scrupulously fair treatment of the public by the transit com-
2382 panies." The transit companies had not acted fairly toward the city, the report said.

April 12, 1919.—Letter from C. J. Smith, recommending increase in fares to relieve "disgraceful" conditions of travel.

April 11, 21, 1919.—Letters from Edward Stouffer, 516 West 34th Street, protesting against decrease in value of stocks and bonds.

April 13, 1919.—Letter from R. J. Marrin, 415 5th Street, Brooklyn, protesting against conditions and suggesting operation of 'bus line

2383

April 24, 1919.—Letter from West Side Children's Welfare Conference, 302 Madison Avenue, New York, protesting against higher fares.

April 25, 1919.—Letter from West Side Children's Welfare Conference, 302 Madison Avenue, New York, protesting against discontinuance of Belt Line R. R.

June 13, 1919.—Letter from Sara McPike, 120 Broadway, N. Y. C., commending Mayor on his stand against increase in fare. 2384

June 27, 1919.—Letter from Hugh P. McKee, 43 Cedar Street, protesting against charge for transfer.

July 15, 1919.—Letter from Charles Netch, 2453 Ralph Street, East Williamsburg, N. Y., protesting against service.

July 18, 1919.—Letter from M. F. McDonough, 223 South Front Street, Philadelphia, protesting against conditions of bondholders and stockholders. 2385

July 22, 1919.—Letter from Mary A. Lennon, 311 West 24th Street, commending Mayor on his stand.

July 20, 1919.—Letter from W. E. Thayer, 38 West 68th Street, demanding that the Mayor prevent any increase in fare.

July 20, 1919.—Letters from W. R. Wright, R. R. Wright and Sidney G. Wright, 2015 52nd Street, Brooklyn, protesting against charge for transfer or increase in fares.

2386

Aug. 1, 1919.—Letter from Thos. Lang, 217 Flatbush Avenue, Brooklyn, commending the Mayor for opposition to increased fare.

Aug. 1, 1919.—Letter from Philip Young, 182 Bond Street, Brooklyn, protesting against charge of 2¢ for transfer.

Aug. 3, 1919.—Letter from "I. V. P.," 141 East 50th Street, New York, protesting against conditions and charge for transfer.

2387

Aug. 4, 1919.—Letter from M. F. McDonough, 223 South Front Street, Philadelphia, protesting against conditions of bondholders and stockholders.

Aug. 6, 1919.—Letter from H. G. Schneider, 610 West 47th Street, commending Mayor on installation of bus lines.

Aug. 7, 1919.—Letter from residents of City Island (Henry B. Nevins and others), protesting against discontinuance of City Island line.

2388

Aug. 8, 1919.—Letter from Elmer Lee, stating that the Mayor's plan for bus lines was a good idea.

Aug. 8, 1919.—Letter from Samuel W. Taylor, 176 Fifth Avenue, commending Mayor on installation of bus lines.

Aug. 9, 1919.—Letter from Edward W. Simonds, 541 West 142nd Street, protesting against granting of any increase in fares.

2389

Aug. 12, 1919.—William H. Robinson, 120 Broadway, protesting against decrease in value of stocks of I. R. T.

Aug. 16, 1919.—Letter from James R. Troland, 237 West 66th Street, commending Mayor for installation of Bus lines.

Aug. 17, 1919.—Letter from H. Trumbauer, 160 Fifth Ave., protesting against service and commending Mayor on his stand for Municipal ownership.

2390

Aug. 17, 1919.—Letter from N. Paguit, Brooklyn, protesting against transit conditions.

Aug. 19, 1919.—Letter from John P. Quin, 157 St. Ann's Ave., Bronx, protesting against conditions and commending the Mayor.

Aug. 20, 1919.—Letter from Arthur D. Price, 1529 Flatbush Ave., protesting against conditions and making suggestions.

2391

Aug. 20, 1919.—Letter from A. W. Lyman, 221 Albemarle Road, Brooklyn, commending Mayor on his stand against increased charges and making suggestions.

Aug. 14, 1919.—Letter from Alex. Sacks, 139a Union St., Brooklyn, requesting that companies be allowed to charge higher fares.

Sept. 5, 1919.—Letter from Walter N. Polovak & Co., 31 Nassau Street, suggesting that transit companies cut down operating expenses.

2392

Sept. 11, 1919.—Letter from R. T. Maitland, commending Mayor and protesting against conditions.

Sept. 11, 1919.—Letter from Robert L. Mott, Richmond Hill, protesting against conditions and making suggestions.

Sept. 12, 1919.—Letter from Alex. Sacks, 139a Union St., Brooklyn, requesting that companies be allowed to charge higher fares.

2393

Sept. 23, 1919.—Letter from Sterling Wallace, 65 Frankfort Street, N. Y., approving bus lines.

Sept. 25, 1919.—Letter from Edward Francis Rochm, 29 Liberty Street, commending the Mayor on stand against increase in fares.

Sept. 26, 1919.—Letter from H. J. McCarthy, 463 59th St., Brooklyn, protesting against conditions on B. R. T.

Crowding at Canal Street station on Fourth Ave. Subway. B. R. T. runs an insufficient number of trains and at too long headway.

2394

Sept. 28, 1919.—Letter from Dr. Alex. Rosenthal, 51 East 96th Street, approving installation of bus lines on East side.

Oct. 1, 1919.—Pamphlet issued by Real Estate Owners' Protective Ass'n, commending the Mayor and Board of Estimate and Apportionment on their stand against increased fare.

Oct. 16, 1919.—Copy of resolution of Sheepshead Bay Regular Democratic Ass'n, against increase in fares.

2395

Oct. 19, 1919.—Copy of resolution of Kings Highway Board of Trade, 1701 Kings Highway, requesting introduction of bus lines.

Oct. 21, 1919.—Copy of resolutions by Douglaston Civic Ass'n., urging solution of the transit problem.

"Whereas, a solution of the transit problem is immediate and profound importance to the entire city."

All public officials urge to "undertake consideration of the disposition of the transit problem." 2396

Jan. 9, 1918.—Letter from John V. Donahue, Madison Ave. & 63rd St., New York City, commending the Mayor on his stand with regard to the traction situation and suggesting that the City of New York take over the traction properties.

Jan. 6, 1919.—Letter from J. C. Brackenridge, 95 Liberty St., N. Y., recommending that a Receiver to represent the City's interest should be appointed in the B. R. T. matter. 2397

Jan. 10, 1919.—Letter from E. Hubuer, 41 St. Paul Place, Brooklyn, protesting against an increase in fares while Mr. Shonts continues to "draw $100,000 a year salary."

Jan. 11, 1919.—Letter from John J. Hopper, 215 W. 125th St., N. Y., congratulating the Mayor on his vote denying an increase of fare, stating in part "These companies enjoyed the fat years, now let them take the lean like every other business has to do."

2398

Jan. 3, 1919.—Letter from "Bondholder and Stockholder," protesting against traction situation and recommending that an increase in fare be granted.

Jan. 13, 1919.—Letter from the New York Board of Trade & Transportation, requesting that a representative of the City Administration appear at a meeting of the Board's Transit Conference, to be held on January 16th.

2399 Jan. 22, 1919.—Letter from John Finck, 198 Broadway, enclosing suggestions for solution. The letter, in part, says: "If both sides will take a dispassionate view, much can be accomplished to ameliorate the present unfortunate situation."

Jan. 25, 1919.—Letter from Charles V. Halley, Jr., 505 Tremont Avenue, criticising the Public Service Commission for its action with respect to the increase of fares and asking for an interview.

2400

Jan. 28, 1919.—Letter from Laurence S. Folger (Colonial Audit Co.), 38 Park Row, enclosing copy of letter to Shonts and stating: "My only regret is that my limited vocabulary and the restrictions of the Post Office authorities make it impossible for me to do justice to the subject."

The final paragraph of his letter to Shonts reads as follows:

"Take my advice—read the handwriting on the wall—the combined power of the laboring element and those who have seen military serv-

2401

ice will no longer permit men like you to crowd them, like cattle, into your cars, wringing the fares from them, giving abominable service, and then—like Oliver Twist, asking for more."

Jan. 31, 1919.—Letter from the Associated Civic Associations of Brooklyn, 1 Greene Avenue, Brooklyn, stating that at the next regular meeting, the B. R. T. transit situation will be discussed.

Jan. 31, 1919.—Letter from A. L. Greggs, suggesting that a system of zone fares be instituted. 2402

Feb. 4, 1919.—Letter from W. Braunsdorf, 457 Myrtle Avenue, Flushing, N. Y., stating that the seven cent fare league, being formed in Flushing, was really in league with the North Shore Traction Co., and that the company could exist with the five cent fare, if its employees were honest or were properly supervised. He stated that from actual observation, he could say that 30% of the revenue of fares was stolen by employees. 2403

Feb. 22, 1919.—Letter from John E. Hanifen, Philadelphia, Pa., stating that he is a stockholder in the Interborough Rapid Transit and approving plea for eight cent fare.

Feb. 24, 1919.—Letter from E. C. Kinner, Orleans, Vt., stating that he is an owner of I. R. T. stock and asking that an increase in fare be granted.

Feb. 24, 1919.—Letter from Wintwood Ball, Chatham, N. Y., petitioning Mayor for an increase of fare to the Interborough.

2404

Feb. 25, 1919.—Letter from Geo. G. Gillett, Pottsdam, N. Y., stating that he had all his money invested in I. R. T. bonds and asking that the company be granted an increase in fare.

Feb. 26, 1919.—Letter from S. G. Hess, 1 West 94th Street, requesting that an increase in fare be allowed the traction company.

Feb. 26, 1919.—Letter from Arthur M. Hess, 31 East 83rd Street, New York, petitioning the
2405 Mayor to grant the increase of fare requested by the I. R. T.

Feb. 27, 1919.—Letter from D. Dickinson, New Brighton, N. Y., urging that the Mayor refuse to grant petition of the I. R. T. for an increase in fare.

Feb. 28, 1919.—Letter from Samuel J. Baxter, 115 Broadway, petitioning the Mayor for an increase in fare to the Interborough.

2406 March 3, 1919.—Letter from John G. Hunt (no address), ex-service man, stating that his entire savings were invested in stock of I. R. T., protesting against refusal of city to grant increase.

March 5, 1919.—Letter from Wm. Jay Garrity (Continental Newspaper Syndicate), 447 East 58th Street, stating "The public of the City of New York travel daily on the different conveyances of the city, i. e., elevated railroad, subway, the street car, etc., and are confronted with a situation that is entirely unde-

2407

sirable," etc., and suggesting that the city take over the transportation lines and run them without charging a fare, and that the carrying charges be covered by assessment and taxation.

March 10, 1919.—Letter from Frank S. Gardner, secretary of the New York Board of Trade and Transportation, stating that an association named "The New York City Transit Conference" had been formed for the purpose of investigating conditions of the Transit Co., and 2408
that a sub-committee had been pointed to confer with the Mayor and the Comptroller.

March 7, 1919.—Letter from Charles T. Gwynne, secretary of the Chamber of Commerce of the State of New York, enclosing copy of report of the transit situation adopted by the Chamber of Commerce at its monthly meeting. The resolution read as follows:

"RESOLVED, That the Chamber of Commerce of the State of New York does hereby 2409
communicate to the authorities of the City and State the feeling of its members concerning the seriousness of the situation presented and requests them to hasten such measures of relief as will remove the existing menace to the credit, the convenience and the growth of the cities which are involved, in recognition of the economic fact that transportation cannot be rendered at less than cost without imposing undue burdens upon taxpayers, security hold ers and the traveling public."

2410

March 20, 1919.—Letter from J. G. Johnson, Reading, Pa., stating that the traction companies have not been given a "square deal" by the city.

March 16, 1919.—Letter from Louis W. Fehr, 147 West 118th Street, New York, asking whether statement of traction companies that unless fares are raised city will have to pay interest on subway construction bonds by taxation, is true.

2411

April 1 and 7, 1919.—Letters from the Law and Order Union of New York City, 15 William Street, New York, asking for an interview with regard to the traction situation

April 20, 1919.—Letter from Wm. J. Kelly, 4 Magnolia Avenue, Jersey City, stating in part "The management of the New York Railways Co. is so absolutely rotten that dozens of improvements can be picked up at any time."

2412

May 7, 1919.—Letter from the Bureau of Municipal Research, 261 Broadway, enclosing copy of a report on the transit situation of Boston, prepared by a member of its staff.

June 27, 1919.—Letter from Miss Mary F. Fox, 390 Hart Street, Brooklyn, stating that discharge by B. R. T. of women employees was purely a political move to discredit the Mayor and the Governor.

July 1, 1919.—Letter from John Tyrone Kelly, editor of the Saturday Sentinal, 550 West 167th Street, protesting in the name of the

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residents of Ft. Washington Avenue, against the granting of a franchise for a bus line through that street.

July 9, 1919.—Letter from J. J. Chambers, president of the 28th Ward Tax Payers' Protective Association, expressing his hope that the Mayor would be successful in preventing the transit companies from receiving an increase in fare.

July 19, 1919.—Letter from H. A. Glasmacher, 72 Trinity Place, New York, suggesting that bus lines be installed to take the place of street cars, and referring to the bus lines operated in London. 2414

July 26, 1919.—Letter from Alfred J. Hale, 245 East 120th St., stating that Municipal Ownership is the only solution of the transit difficulties.

Aug. 2, 1919.—Letter from James J. Jones, 15 Park Row, enclosing copy of letter sent to Public Service Commission protesting against the discontinuance of the Staten Island Transfer. 2415

Aug. 14, 1919.—Letter from Geo. E. Berna, New York City, protesting against any increase in fare, stating that the traction companies were greatly over-capitalized.

Aug. 18, 1919.—Letter from Dorothy Godfrey, 267 W. 139th St., suggesting that the City take over the Transit Lines, stating that the public would then willingly pay an increased fare if necessary.

2416

Sept. 2, 1919.—Letter from J. Henry Falk, 68 W. 116th St., protesting against increase in the fare, and stating that increased revenue of transit companies is almost enough to cover increased wages, etc.

Sept. 1, 1919.—Letter from A. Hartung, 420 East 85th St., requesting that no increase in fare be granted.

Sept. 2, 1919.—Letter from Patrick Herlihy, 58
2417 No. 8th Ave., Whitestone, Long Island, expressing gratitude for the "honest and fearless" attitude of the Mayor and condemning the action of Commissioner Nixon in allowing an increase in fares.

Sept. 2, and Sept. 19, 1919—Letters from the Institute for Public Service, 51 Chambers St., asking for an interview for the purpose of discussing the traction situation.

Sept. 3, 1919.—Letter from John Jones (no ad-
2418 dress), suggesting that the Mayor ascertain "what becomes of the millions of dollars which the Interborough Company gets for the advertisements in the trains of the subways and elevated."

Sept. 5, 1919.—Letter from I. T. Flatto, 261 Broadway, enclosing an affidavit for use by the Mayor in connection with the opposition to an increase in fare granted by the Public Service Commission on the North Shore Traction Co. line. The affidavit in short stated that an investment made by Mr. Flatto in

2419

buildings and property on the line of the North Shore Traction Co., in Flushing would be jeopardized by the increase.

Sept. 16, 1919.—Letter from Ernest Harvier, 1193 Broadway, enclosing clipping from Knickerbocker Press of Albany, stating that the Albany Chamber of Commerce had requested the Public Service Commission to require the traction companies to show that they had exhausted all other means of increasing their revenue, before they should be allowed an increased fare. 2420

Sept. 16, 1919.—Letter from Benj. Fitch, 94 Hick St., Brooklyn, suggesting institution of zone system as a solution of the difficulties of the I. R. T.

Sept. 5, 1919.—Letter from Margaret E. Craig, 1718 Metropolis Ave., Richmond Hill, Long Island, protesting against charge for transfers and stating "I hope you will consider the heartlessness of this company when they try to oppress the City of New York in granting an increased fare. 2421

Sept. 18, 1919.—Letter from Louis J. Frank, Supt. of Beth Israel Hospital, New York, protesting against the discontinuance of the Madison Street Car Line, stating in part "No consideration was taken of the necessity of this line of transportation to the toiling masses who live in this densely populated section," and also stating that such action tended to breed Bolshevism.

2422

Sept. 19, 1919.—Letter from Wm. Edwards, 720 Beck St., New York, protesting against conditions of travel in the subway and stating in part: "Today, all we can get from the I. R. T. Co., is the Subway Sun, and the camouflage it contains in the way of paving the way for as high a fare as they can get, and, Sir, we may thank you that we are not paying it."

Sept. 22, 1919.—Copy of letter of Saml. L. Fleischman (no address), to "My dear Governor" stating that the discontinuance of the east side car lines was a bluff and suggesting that the lines be bought and operated by some person of means.

2423

Sept. 24, 1919.—Letter from J. R. Bowman, 328 Brandywine Ave., Schenectady, N. Y., stating that increased cost of commodities and service throughout the country warranted the granting of an increase in fares to New York City Traction Co.

Oct. 2, 1919.—Copy of letter of Miss E. Gorman (no address) to Commissioner Nixon, requesting that an increase of fare be granted the companies, or at least that a vote of the people of the City of New York be taken on the question.

2424

PUBLICATIONS IN THE PRESS.

May 13, 1919, Standard Union; May 14, 1919, Evening World.—Headline "No Justification for Double Fare." Statement by Dist. Attorney Lewis, commenting on test case brought by members of Borough Park Heights Civic Association to test 10¢ Coney Island fare.

2425

May 15, 1919, Brooklyn Times.—Meeting of 28th Ward Taxpayers Association in protest against conditions.

June 18, 1919, Standard Union.—Meeting of Bay Ridge Merchants Ass'n, addressed by Maxwell S. Harris, president of Borough Park Civic Ass'n, recharge of 10 cents fare to Coney Island.

June 19, 1919, Journal.—Headline "24 Bodies in central Brooklyn to fight foes of transit relief." 2426

"Organizations affiliated with Associated Civic Ass'n:

Taxpayers Protective Ass'n of Brooklyn.
Fulton Street Board of Trade.
East Brooklyn Citizens Ass'n.
Bedford and Hill Taxpayers Ass'n.
Utica Heights Board of Trade.
Bedford and Park Ave. Board of Trade.
Classan Ave. Sewer Assessment Protest Ass'n.
Brevoort Taxpayers Ass'n.
Atlantic Ave. and Brooklyn Improvement Ass'n. 2427
24th Ward Board of Trade.
Sterling Protective Ass'n.
United Property Owner's Ass'n.
Bedford Heights Board of Trade.
Fulton Street Protective League.
Central Citizens League.
Washington Avenue Ass'n.
19th Ward Improvement Ass'n.
Franklin Board of Trade.
Gravesend Beach Board of Trade.

2428

Associated Motion Pictures Exhibitors of Brooklyn and Long Island.
Garage Owner's Board of Trade.
Brooklyn Motor Vehicle Dealer's Ass'n.
Highland Park South Civic Ass'n.
Teachers Welfare League of Brooklyn.
Men's Club of Bethany Presbyterian Church and a dozen others."

2429

June 19, 1919, Eagle.—Reports "vigorous protests by civic organizations, real estate operators and business men" over plan of New York & Queens County Ry. Co. to abandon its service over Queensboro Bridge.

June 13, 1919, Evening World.—Business interests and taxpayers' associations of Staten Island protest against discontinuance of Staten Island ferry transfers.

2430

June 10, 1919, Eagle.—Report of arrest of three members of Borough Park Civic Association for refusal to pay 10 cent fare to Coney Island. Defendants insisted on hearing before magistrate to make a test case.

(On May 11, 1919, Sidney Kaufman of 1254 41st Street, David Carson of 1362 46th Street, and Samuel Soacki of 1211 41st Street, refused to pay the second fare at the West End Terminal at Coney Island, and jumped over the turnstile. Their arrest was caused by Benjamin Banks, a special officer of the B. R. T., who also accused them of having caused a crowd to collect and shouted to other passengers to refuse to pay the second fare. After several adjournments and when the case was called on

2431

June 10, Harold B. Warmer appeared for the B. R. T. and offered to withdraw the complaint if the defendants would sign an agreement not to sue the company for causing their arrest. Maxwell S. Harris, the attorney for the three men, refused the B. R. T.'s offer and insisted that the question of the right of the company to charge the second fare be tried before the magistrate. Magistrate O'Neil said he would not go into the fare question. On August 27th Magistrate O'Neil in the Coney Island Court discharged the three men on the ground that the charge of disorderly conduct had not been proven. He again refused to consider the second fare question.)

2432

Aug. 1, 1919, Herald.—Meeting of Straphangers' Association sent resolution to Gov. Smith, protesting against two cent transfer charge and demanding investigation.

This association was composed mostly of members of McKinley Park Board of Trade and Fourth Avenue Subway League.

2433

Aug. 1, 1919, Globe.—"Car Riders Rage at No Transfer."

"Conductors and passengers in constant wrangle."

"Puzzles confronted travellers in all parts of the city."

"Many ride on elevated to escape payment of two cents."

"In South Brooklyn conductors experienced much difficulty in conveying to foreigners some understanding of new charge."

2434

Aug. 7, 1919, American.—"Many members of civic associations announced determination of calling meetings of these organizations to endorse Mayor Hylan's proposition" (re bus lines).

Aug. 9, 1919, Journal.—Broadway Association urges use of buses on Broadway.

Aug. 9, 1919, American.—Central Federated Union demands removal of Garrison as receiver.

2435 Aug. 11, 1919, American.—Central Federated Union (representing 500,000 workers) approves bus plan.

Aug. 13, 1919, American.—Attorneys offer services to Straphangers' Protest Association in fight against two cent transfer charge.

Aug. 13, Standard Union, Brooklyn Times.—Transit League of Southern Brooklyn urges installation of bus lines.

Aug. 20, 1919, Tribune.—"The man who rides is
2436 well satisfied with the strike settlement, but he is ready to make a vigorous protest if the car men's increased pay must come out of his pocket in the form of an eight cent fare."

July 12, 1919, N. Y. American.—"Central Federated Union, representing organized labor in New York, demands municipal ownership as a protest against two-cent transfer charge. Protested to Mayor Hylan, Gov. Smith and Judge Mayer."

2437

July 17, 1919, Standard Union (Editorial).—"Is it any wonder the people are skeptical? When they are told the car companies are bankrupt and cannot make ends meet unless permitted to dip into the pockets of the public and take more millons out, they think of what the same set of men, or their immediate predecssors, did with great railroad properties in the past. And what guarantee is there the same thing will not be done over again."

2438

July 19, 1919, Standard Union (Editorial).—"The people protest against the seven cent fare in vain."

July 21, 1919, Evening World.—"W. J. Mackin, president of the Bath Beach Taxpayers Association, announced that a meeting of the organization would be held Wednesday night to discuss the order of Public Service Commissioner Nixon, permitting a charge of two cents for each transfer.

"An effort is being made to crystallize sentiment for a gigantic mass meeting in Brooklyn to protest against the two cent charge for transfers."

2439

July 30, 1919, New York American.—"Mass meeting of protest held at Brooklyn Public Library, Bushwick and DeKalb Avenues, under auspices of Allied Board of Trade and Taxpayers' Association of Brooklyn. Mayor Hylan and others spoke. Committee appointed to call a meeting of all civic organizations in Brooklyn to fight two cent transfer."

2440

Sept. 11, 1919, N. Y. American.—District No. 15 of International Association of Machinists appoint committee of 100 to aid Mayor Hylan in fight against higher fares. Committe represented membership of 20,000.

Sept. 12, 1919, Tribune, Herald.—Shut down of storage battery lines will inconvenience 250,000 people.

Sept. 2, 1919, Evening Sun.—"New Yorkers got
2441 another hard blow in the transportation belt by a second decision of the Federal Court yesterday. This was in the form of an order from Judge Mayer, which provided that the Ninth Avenue surface line should be severed from the unified system of the New York Railways. * * *."

Sept. 12, 1919, Citizen (Editorial).—After describing abandonment of storage battery lines said:
"In the meantime large part of the East side will walk. But even if the Mayor succeeds in establishing a bus system, the 3,500,
2442 000 transfer passenger on the East Side will have to pay a double fare in the future."

Sept. 12, Standard Union.—13th Assembly District Taxpayers Ass'n., protest against raising of fares, and pledged aid to Mayor Hylan.

Sept. 13, 1919, Post.—Quoting Mayor Hylan:
"The responsibility of closing down these lines rests entirely on Judge Mayer of the Federal Court, and the Receiver, Job Hedges."

2443

Sept. 16, 1919, Sun.—"Much confusion was caused among Staten Islanders having business in Manhattan, or vice versa, yesterday because of a suspension of the arrangement whereby transfers were exchanged between the city ferry boats and the New York City railways cars at the Battery."

Sept. 17, 1919, Times (Brooklyn).—Mass meeting under auspices of Associated Civic Associations of Brooklyn at Apollo Hall, Sept. 16.

2444

Sept. 18, 1919, Sun.—Harriet Watson, brought suit in Supreme Court to restrain the N. Y. & North Shore Traction Co., from charging more than five cents.

Sept. 18, 1919, Tribune.—Mass meeting under auspices of Community Councils of National Defense, to be held Sept. 18, at Public School, at Hester and Essex Streets, to protest against abandonment of storage battery lines.

Sept. 18, 1919, N. Y. American, Herald, Sun.— 2445
Committee of East Side citizens, headed by Magistrate Blau, called on Judge Mayer and protested against shutting down of downtown crosstown lines.

Sept. 18, 1919, N. Y. American, Herald, Sun.—"Residents of the East Side will protest at a mass meeting to-night * * *. The meeting will be held under auspices of the Community Councils of National Defense in Public School No. 62, Hester and Norfolk Streets."

2446

Sept. 19, 1919, Tribune.—(Above meeting held).

Sept. 18, 1919, Evening World.—Downtown Chamber of Commerce, voted to send representative to Mayor Hylan to request bus service. "Otherwise there is nothing to do but submit to the piracy of the traction interests and agree to pay an increased fare. We cannot permit the East Side, with a million people, to be shut off from the rest of the world."

2447 Sept. 18, 1919, Standard Union.—"Vigorous protests over the abolition of transfers between the elevated and subway lines, as mentioned in the order of the B. R. T., to become effective Oct. 16, were made today by citizens in the sections affected. The proposed action was condemned in no uncertain terms and was declared to be inconsiderate and harsh and likely to work untold hardships upon those unfortunate enough to live in the districts which will be affected."

"When the order granting the B. R. T. the
2448 right to charge an extra two cents for transfers went into effect, there was much objection to it and angry denunciation of the company, but finally the indignant citizens paid. Now, when the last of the free transfers from 'L' and subway lines are abolished and a flat charge of an extra fare is asked, the protests are most bitter."

The following associations registered protest:

Flatbush Chamber of Commerce.
Bay Ridge Chamber of Commerce.
Bay Ridge Merchants' Association.
South Midwood Residents' Association.

2449

Sept. 19, 1919, N. Y. American.—Meeting of Non-Partisan Vigilance Committee at City Hall.

Sept. 20, 1919, N. Y. American.—Committee formed. Decided to hold meetings in all boroughs.

Sept. 19, 1919, Evening Sun (Editorial).—"No; the workman must walk. He must add a tramp of perhaps two miles or more a day to his journey to or from work. That means getting started earlier and home later. If he 2450
can reach some other crosstown line by a shorter walk he will have the pleasure of paying an extra two-cent fare for his transfer."

Sept. 20, 1919, N. Y. American.—Report of installation of bus service.

"While the East Side is deeply grateful to Mayor Hylan for his quick action in supplying its transportation needs, it is no less indignant at the brutal treatment accorded to it by 'Let the East Side Walk' Hedges."

Committee called on Hedges to protest, 2451
Harry Kopp, lawyers, reported as saying

"* * * Nothing has aroused so much dissatisfaction among my people, and nothing has done more to undermine what we have been trying to teach them in the last few years than the withdrawal of these crosstown lines. It has increased the spirit of unrest."

Sept. 22, 1919, Citizen.—"Throughout Brooklyn great dissatisfaction is reported at the prospect of residents of the suburban districts being obliged to pay two, and in some instances

2452

three fares. A meeting of various civic organizations is to be held soon to protest against the reversion of the lines at the office of the Brooklyn City Railroad Company."

Sept. 22, 1919, Evening World.—"The discontinuance today of the four storage battery lines has caused great dissatisfaction in the lower east and west sides.

Sept. 30, 1919, N. Y. American.—"It was learned
2453 last night that residents of Brooklyn are to make strong protest against the order of Judge Mayer and the prospect of being called upon to pay additional fares.

"Herbert Low, president of the Flatbush Chamber of Commerce, has called a special meeting of that organization for to-morrow night to discuss the disintegration of the surface lines and the fare question."

Sept. 30, 1919, Brooklyn Times.—Headlines: "B. R. T. Dissolution, With 10 & 15¢ Fares,
2454 Angers Whole Borough; Indignation Meetings Called.

"Great indignation was expressed throughout Brooklyn today over the results which appear certain to follow yesterday's action of Judge Mayer.

"It was the one topic of conversation * * * among the local trolley riders this morning on their way to business * * *.

"This morning various board of trades and taxpayers' association officials were in conference to decide whether meetings should be called to protest against the big fare in-

2455

creases which appear imminent, and it is not improbable that a great mass meeting of the associated bodies may be held."

Sept. 30, 1919, Citizen (Editorial).—"* * * And to think that all this *chaos* and litigation could have been avoided if politics had been kept out of the matter. * * *

Sept. 30, 1919, Citizen.—"The traveling public in Brooklyn is awaiting with keen interest the decision of the company, and it seems likely that meetings will be held throughout the borough to protest against the exacting of two and three fares where one is now paid." 2456

Oct. 1, 1919, New York American.—Meeting of Flushing United Association in protest against traction situation.

Oct. 1, 1919, Sun.—"* * * While Brooklynites, wrathful at the prospect of paying 10 or 15 cents for car rides hitherto retailing for 5, were looking around yesterday for somebody to blame, President T. S. Williams of the B. R. T., in common with others, pointed to city officials." 2457

Passengers' Protective Association, Flatbush Chamber of Commerce and other citizen organizations held meetings of protest.

Oct. 1, 1919, New York American.—Public meeting of protest held in headquarters of Peter J. McGuinness, Democratic candidate for alderman, 18th District.

John B. Johnston, candidate for District Attorney; James J. Brown, candidate for sheriff, and others spoke.

2458 **Defendant's Exhibit "W."**

MEMORANDUM OF JUDGE MAYER.

Dec. 27/19.

P. 7.

"As the result of these and other proceedings, hundreds of transfer points were eliminated and millions of passengers are now compelled to pay at least 10 cents where they heretofore paid 5 or 7 cents.

2459

P. 7.

"In addition it became necessary to order the temporary discontinuance of certain lines serving millions of passengers annually."

* * * * * * * *

P. 8.

"In addition to the foregoing, it has been impossible to keep the maintenance up to the standard which the court and the receivers desire or to give
2460 the service to which the court and the receivers feel the public is entitled."

P. 12.

"4. Surface lines in Manhattan and Brooklyn disintegrated with extra fares, largely decreased transfer points and some important routes temporarily discontinued."

Exhibit F to Petition for Writ— Opinion of Judge Mayer. 2461

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

CHARLES L. CRAIG,
Defendant. 2462

FRANCIS G. CAFFEY, United States Attorney, BEN A. MATTHEWS, Assistant United States Attorney, for the United States.

JOHN P. O'BRIEN, Corporation Counsel (EDMUND L. MOONEY, CHARLES T. B. ROWE, ALFRED B. CRUIKSHANK, RUSSELL LORD TARBOX and ELI S. WOLBARST, of Counsel), all of New York City, for defendant. 2463

Mayer, District Judge:

On October 1, 1919, Lewis Nixon, then Public Service Commissioner addressed identical letters to the members of the Board of Estimate and Apportionment of the City of New York, to Receivers appointed by this Court, to transit officials and to representatives of security holders inviting them to attend a conference to be held at the office of the Public Service Commission at 10:30 of the morning of October 6, 1919.

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Defendant received one of these letters, a copy of which is annexed as Appendix A.

On October 6, 1919, at 10:40 A. M., as appears from the minutes of the Public Service Commission, the conference began but defendant was not among those present.

After some discussion, it was concluded by the Public Service Commissioner, in response to views expressed by the Transit Construction Commissioner that a full and free consideration of the subject matter and the questions involved could more
2465 effectively be undertaken in a closed conference and thereupon, as the minutes state, "various spectators and newspaper men left the room."

After this had occurred, further discussion took place and then the Public Service Commissioner said: "I have received a letter from Mr. Craig, the Comptroller, and I think I will read it as explaining his reasons for not meeting here with us."

The letter referred to was thereupon read by the Public Service Commissioner. A copy is hereto attached as Appendix B.

Thereafter, and on the same day, October 6, 1919,
2466 the court filed the following order:

> "It is hereby ORDERED that the United States Attorney advise the court by formal information concerning the conduct of one Charles L. Craig on October 6, 1919, at which time he is reported to have published or caused to be published a written communication addressed to Hon. Lewis Nixon, Public Service Commissioner, No. 49 Lafayette Street, New York City, concerning the orders and action of this court in a pending cause or causes."

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On November 3, 1919, the United States Attorney filed an information charging defendant with contempt of court. After a recital of the facts, the information alleged, among other things, the following:

"1. In said letter it was stated that this Court in the said suits and proceeding was responsible for a policy of denying to the defendant and to other members of the Board of Estimate and Apportionment of the City of New York any access to original sources of information concerning the property and affairs of the various public utility corporations in the hands of receivers appointed by this Court and holding franchises to operate in the streets of New York; whereas, in truth and in fact this Court never adopted such a policy, but on the contrary afforded to the defendant and to all members of the Board of Estimate and Apportionment of the City of New York access to the said original sources of information and every facility for obtaining information concerning the property and affairs of the said corporations and expressly directed that the City of New York and its officials should have access to such information, and in truth and in fact at no time since this Court assumed jurisdiction of any of said corporations as aforesaid has this Court or any one acting under its authority ever denied to the defendant or to any member of the Board of Estimate and Apportionment, or to any authorized representative of the City of New York or of any of its officials, access to original or to any other

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sources of information concerning the property or affairs of any of said corporations.

2. In said letter it was stated that this Court made orders which precluded any application being made by the authorities of the City of New York to any other Court or Judge for any right of examination into the affairs or conditions of the said public utility corporations; whereas, in truth and in fact this Court has never made any such order, and on the con-
2471 trary, prior to the writing of said letter, this Court expressly ordered and directed that there should be given to the authorities of the City of New York every opportunity and facility for making such examination.

3. In said letter it was stated that the orders of this Court denied to the authorities of the City of New York the opportunity to ascertain the truth; whereas, in truth and in fact this Court has never made any such order, and has never made any order that has, has had, or could have such effect, but on the contrary
2472 prior to the writing of said letter this Court ordered and directed that there should be afforded to the authorities of the City of New York every opportunity and facility for ascertaining the truth.

4. In said letter it was stated that an order of this court stands between the public and the truth; whereas, in truth and in fact no order that this Court has made has, has had, or could have such effect, but on the contrary every order in the above mentioned suits and pro-

ceeding tended and was designed to place the public in possession of the truth, and prior to the writing of said letter this Court expressly ordered and directed that every facility be afforded to public officials and citizens' associations to satisfy themselves in respect of the financial and other conditions existing in relation to the corporations in charge of said receivers."

It was then alleged that, "All of the foregoing statements in said letter, numbered from 1 to 4 2474
inclusive, and each of them, are and were false and were known by the defendant to be false when made and were made in reckless disregard of the truth."

Thereafter, an order to show cause was signed by the Court requiring defendant to show cause on December 2, 1919, "why he should not be declared and adjudged in contempt of this court by reason of the facts set forth in the said information."

Counsel for defendant appeared specially and raised certain questions as to the jurisdiction of the court, which were decided adversely to defendant. The opinion of the court in this regard was dated 2475
December 23, 1919. The court then set December 29, 1919, as the date for the appearance of defendant.

Defendant's next step was to demur to the information on twenty-eight grounds. The court overruled the demurrer and filed its opinion, dated March 8, 1920, in respect of the questions raised by the demurrer and ordered defendant to plead to the information on March 15, 1920, *United States* vs. *Craig*, 266 F. R., 230.

Defendant pleaded not guilty and the trial of the case began on May 10, 1920, and was concluded

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on June 10, 1920. The testimony is transcribed in 791 pages of stenographer's minutes and the exhibits are many and voluminous. In response to the request of counsel and in view of the length of the record and the many exhibits, the court set a date in the Fall for the submission of briefs. Extensions beyond the original date set were asked for and granted. The reply brief of defendant is dated October 30, 1920, and briefs were finally submitted to the court shortly thereafter.

2477 In *United States* vs. *Craig, supra,* the Court pointed out the grounds upon which the letter of defendant, considered by itself, must be regarded as contemptuous in certain respects. There are certain parts of the letter which are within the domain of free and permissible criticism. There are certain other parts which are not.

In the opinion, *supra,* the court stated, among other things:

> "The proceeding against defendant is brought under Section 268 of the Judicial Code which is in part as follows:
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> 2478 'The said courts (United States Courts) shall have power * * * to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority. Provided, That such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. * * *'
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> * * * * * * * *
>
> The right to criticize the correctness of the decisions of courts and judges has always ex-

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isted under our form of government and must continue to exist, not merely as a right possessed by the individual but as a safeguard to our institutions. * * *

But such right must not be confused with the 'the misbehaviour * * * so near' the presence of the court 'as to obstruct the administration of justice.' Of this latter conduct the following from the letter of October 6, 1919, is a sufficient illustration:

'Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.'

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* * * * * * * * *

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Read with the entire context, there is no escape from the conclusion that the letter in this respect charged a court of justice with adopting a policy which denied to public officials access to original sources of information to which such public officials were entitled. On demurrer, the court can look only to the face of the writing and is not enlightened as to what was in the mind of the defendant as distinguished from what was expressed by him in writing.

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Such a charge is, indeed, grave. If true, the court which sanctions such a course is rightly subject, at least, to serious criticism. If false, he who is responsible for the utterance, has undertaken a serious responsibility in publishing that which, if believed, must bring a court into contempt and distrust and in any event must create doubt in the minds of the uninformed as to the propriety and right of the court's conduct.

* * * * * * * *

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It must be plain that 'policy' means a concontinuing course in a pending cause and the alleged false statement in respect thereof looked to the present and the future as well as the past. But, it is not necessary to place the decision of this question on either narrow or technical ground. The question is broader and reaches further.

Such statements as are alleged in the information to be knowingly false have, for their purpose and expected effect, the creation of a fear in the mind of the court that it will in-

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vite popular distrust and perhaps condemnation if it continues the course which it has pursued. The assault is based on the assumption—fortunately rarely correct—that the court will shape its decisions to meet passing popular approval and to avoid passing popular criticism. It is intended to play on human frailty and to deflect and deter the court from the performance of its duty and drive it into a compromise with its own unfettered judgment by placing it, through the medium of knowingly false assertion in a wrong position before a public which has little opportunity

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to investigate the facts and ascertain the truth.

Such conduct, however futile in its results, clearly constitutes 'an obstruction to the administration of justice.' * * *

The question is not whether, as matter of fact, the court has been or will be deterred from the performance of its duty; but, as said by Mr. Chief Justice White:

'The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial 2486
duty. * * *'

'Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers 2487
conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongul acts.'"

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Toledo Newspaper Co. vs. *U. S.*, 247 U. S., 402.

It may be well to repeat that ordinarily the court does not concern itself with attacks of a personal nature nor should it interfere with the fullest exercise of the right to criticize freely. Whether such criticism be just or unjust, the court cannot descend to controversy. It can only hope that, in the light of facts and actual happenings, its conduct may be understood in due time.

2489 A charge, however, either that the court has denied to public officials "any access to original sources of information" in respect of properties being administered by the court or that it has adopted and practised a policy of denying such access, is one of the gravest charges which can be made against a court. One of the great developments in the administration of justice in Anglo-Saxon jurisprudence was that justice should be administered in the open.

So firmly is it established in the administration of justice in American courts that records shall not be secret, that a charge of this character can only have the effect of creating distrust in the minds of those who are not informed. There are few men who do not desire the good will and the confidence of the community in which they live and this is a human desire entertained as much by judges as by others. They realize that while errors of judgment are usually treated with tolerance, deliberate denial of the opportunity of ascertaining the facts in respect of matters affecting the public welfare will not and should not be tolerated.

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When, therefore, such a charge is made one of its subtle purposes is to subject a court to public

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condemnation and, thereby, to intimidate the judge into adopting a course, contrary to what he may deem proper and just.

With this understanding of the nature of the case, it remains to examine the principal contentions advanced on behalf of the defendant.

1. *Publication.* It is urged that there was no publication of the letter, as matter of fact and law. There was much testimony taken on this point. After the letter was dictated by defendant on the morning of October 6, 1919, the steno- 2492
grapher who transcribed the notes, read the letter pursuant to defendant's direction, to the Committee on Finance and Budget of the Board of Estimate and Apportionment (composed of all the members of the Board) which was then holding a meeting in the Comptroller's office. It was not marked "private" nor "personal" and was then sent by hand to the Public Service Commissioner who was holding the conference above referred to. All such letters, according to defendant's testimony are filed in the Comptroller's office and open to public inspection. 2493

From the practice in the Department of Finance, defendant knew that such a letter would become public and, obviously, would be published in the newspaper. The record establishes that there was a publication of the letters

(1) by reading it to the Committee on Finance and Budget of the Board of Estimate and Apportionment;

(2) by sending it to the Public Service Com missioner;

(3) by the publication in the daily press.

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2. *Denial of Access.*

Prior to September 1, 1919, experts had been engaged by the Receivers pursuant to the Court's directions to report, among other things, on the financial position of the corporations and properties then being administered by the Court through its receivers. The experts submitted their preliminary report or summary under date of September 4, 1919.

Upon the submission of such report, the Court
2495 filed a memorandum dated September 6, 1919, calling attention to the report and the serious financial conditions therein set forth, and, among other things, instructing the Receivers as follows:

> "In order that the gravity of the situation may be generaly made known and that some appropriate action may be taken as speedily as is consistent with full information, the Receivers are instructed to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal
> 2496 authorities, and to civic and taxpayers' associations of the Greater City. *At the same time, the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations to satisfy themselves in respect of the actual financial and other conditions existing in relation to the corporations now in their official charge.*"

On September 8, 1919, a copy of this memorandum and of the report of the experts was mailed to defendant. Defendant had read this memorandum of the Court prior to October 6, 1919. (Sten. Min., 732, *et seq.*)

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Defendant, however, never availed himself of the opportunity thus urgently extended to examine and investigate. The undisputed testimony shows that neither the defendant nor any official or representative of the Municipal government ever applied directly or indirectly to Receiver Garrison, Receiver Hedges or Trustee Sheffield to have access to any papers, documents or information of any kind or description whether they were "original sources of information" or otherwise; and that the policy of the Court as carried out by its officers was to invite access to any information in their possession or under their control. 2498

The testimony of the defendant himself was to the same effect, viz., that access had never been denied to him and that he never had made any application of any kind or description for access to "original sources of information" or any information whatever.

3. The statement that the Court made orders, which precluded any application being made by the authorities of the City of New York to any other Court or Judge for any right of examination into the affairs or conditions of the said public utility corporations, was shown by the testimony to have no foundation in fact. No such orders were made. 2499

4. The statement that the Court made orders denying to the authorities of the City of New York the opportunity to ascertain the truth, was shown by the testimony to have no foundation in fact. No such orders were made.

5. The statement that an order of the Court stood "between the public and the truth" was

2500 shown by the testimony to have no foundation in fact. No such order was made.

6. *Intent.* Defendant Craig insists that he did not intend to commit any contemptuous act nor to charge any wrongful conduct against the Court. In answer to questions from his counsel he testified as follows:

> "Q. Now, in writing this letter, did you have any intention whatever of a contemptuous act
2501 towards Judge Mayer?
> A. Certainly not. * * *
> Q. Now I will put the question in this way: In writing this letter, did you have any intention to commit any contemptuous act towards the Court?
> A. I did not.
> Q. Did you have any intention to charge any misconduct, ignominy or wrongful conduct of any kind or character towards Judge Mayer, or towards the Court?
> A. No" (Sten. Min., page 718).

2502 It appears that defendant introduced a resolution in the Board of Estimate and Apportionment in January, 1919, authorizing an application to the Court that he, as Comptroller of the City of New York, should be appointed a co-receiver of the so-called B. R. T. Rapid Transit Companies. The resolution was adopted. This application was made to the Court on January 15, 1919, and was denied. (See opinion of Court, Printed Volume I, Proceedings B. R. T. Receivership, page 233 *et seq.*)

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Defendant testified as to his state of mind induced by the denial of the application to appoint him a co-receiver; but he did not attempt to give to the language of his letter other than its plain and unmistakeable meaning.

His mental attitude was thus stated by him:

"It was my view on the 6th of October, as it had been in the preceding February, that it was only that kind of access (i. e., that which would flow from his appointment as co-receiver) to original sources and access with 2504
power under the control of the Court to require any subordinate, however recalcitrant, or unwilling he might be, to produce whatever there was in the way of information, so that with that in view, and desiring to get Nixon where, if he could accomplish something, he could put the municipal authorities on the same footing as the attorneys for the traction companies, I wrote this letter of October 6th to him, using language that I thought would get into the mind of Nixon, the necessity for that kind of cooperation * * * (Sten Min., 2505
page 633).

The Court: If I understand correctly, it was not intended to convey the meaning that at any time the Judge referred to have in point of fact denied access to any—particularly papers, documents or sources of information, except in connection with what you regarded as the results flowing from the refusal to appoint yourself in your representative capacity as receiver?

The Witness: That is correct * * *"
(Sten. Min., page 715).

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In addition to the foregoing testimony, numerous questions were asked and answered with regard to other parts of the letter and the testimony was in general to the same effect as quoted, *supra.*

From the testimony, it will be found that defendant himself testified:

a. That the court never denied him access to any information;

b. That the statement by defendant as to the "policy" of "denying access" was not intended to refer to any actual occurrences but to the result

2507 which, from defendant's point of view, flowed from the refusal to appoint him co-receiver.

It is a fundamental principle that men are held responsible for the natural consequences of their acts. The unexpressed state of mind of defendant may explain what moved him to write as he did but cannot change the plain meaning nor the effect of what he wrote. The plain meaning of defendant's language was to charge the court with conduct incompatible with the due administration of justice—which charges were false—and the effect was "to obstruct the administration of justice."

2508 *Toledo Newspaper Co.* vs. *U. S., supra.*

It is, therefore, found, that in respect of the matters set forth in the Paragraphs numbered 1, 2, 3 and 4 of the information, the defendant is guilty of contempt of court under Section 268 of the Judicial Code.

The United States Attorney is directed to submit to the court, on two days' notice to counsel for defendant, a proposed order in accordance herewith which shall also provide that the defendant shall appear before the court in Court Room 331, of the Old Post Office Building on February

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24, 1921 at 2 P. M., at which time such further proceedings will be had as may be proper.

The defendant is not only the incumbent of a high office, but is also a member of the bar of this court. It is manifestly his duty to do all in his power to repair the wrong he has done.

It is not a wrong with which the judge concerns himself in a personal sense and for that reason no personal apology is desired nor required. The wrong has been perpetrated against the administration of justice.

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The reparation which is within the power of the defendant is promptly to make and file in the office of the Clerk of the Court an unqualified retraction of the false statements respecting the court, referred to in Paragraphs 1, 2, 3 and 4 of the information.

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2512 **Exhibit G to Petition for Writ—Order.**

At a Stated Term of the United States District Court held in and for the Southern District of New York in the United States Courts and Post Office Building in the Borough of Manhattan, City, County and State of New York, on the 24th day of February, 1921.

Present—Honorable JULIUS M. MAYER, United
2513 States District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

against

CHARLES L. CRAIG,
Defendant.

2514 The issues joined herein upon the information and the defendant's plea of not guilty having duly come on for trial, and the evidence adduced by the parties having been received and the argument of counsel for the United States and for the defendant heard,

NOW, after due deliberation thereon, it is

CONSIDERED, ORDERED AND ADJUDGED that the defendant Charles L. Craig

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is, and hereby is found and declared, guilty of contempt of this Court as charged in the information, in respect of the matters set forth in paragraphs numbered 1, 2, 3 and 4 of the information herein; and it is

FURTHER CONSIDERED, ORDERED AND ADJUDGED that the said defendant appear before this Court, at the United States Courts and Post Office Building, Borough of Manhattan, New York City, in Courtroom 331 thereof, on February 24, 1921, at two o'clock in the afternoon of that day, for such further proceedings herein as may be proper.

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(sgd) JULIUS M. MAYER,
United States District Judge.

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2518 **Exhibit H to Petition for Writ—Summary of Testimony on the Contempt Trial.**

This Exhibit was a summary of the testimony on the Contempt Trial. The transcript of the testimony and proceedings is among the Exhibits received in evidence on the trial on Habeas Corpus, *supra,* pages 89 to 820; and therefore this Exhibit is not printed here to avoid repetition.

2519 The papers referred to in Paragraph 18 of the Petition for Writ of Habeas Corpus are the exhibits on the trial of the Contempt Proceeding, received in evidence on the trial in Habeas Corpus, and are not printed here to avoid repetition.

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Return to Writ of Habeas Corpus. 2521

Before—Honorable MARTIN T. MANTON, Circuit Judge of the United States.

In the Matter
of
CHARLES L. CRAIG,
Petitioner.

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To the Honorable Martin T. Manton,
Circuit Judge of the United States:

1. Comes now Thomas D. McCarthy, United States Marshal for the Southern District of New York, and for his return to the writ of habeas corpus issued herein certifies and states, in conformity with the provisions of Section 757 of the Revised Statutes of the United States, as follows, to wit:

II. It is respectfully urged that your Honor is and was without jurisdiction or authority to issue 2523
any writ of habeas corpus to the petitioner herein, because no provision of the laws of the United States vests authority to issue writs of habeas corpus in any Circuit Judge or in any Judge of the United States Circuit Court of Appeals.

III. It is respectfully urged that on its face the petition upon which the writ of habeas corpus herein was granted is insufficient in law, that the petitioner is not entitled thereto and that the writ should therefore be quashed, for the following reasons:

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(a) The petition for the said writ does not allege facts sufficient to show that the proceedings upon which the petitioner was committed and under which he came into the custody of this respondent were not regular or were not in compliance with the statutes of the United States applicable thereto.

(b) The petition does not allege facts sufficient to show that the Court which sentenced and committed the petitioner did not have jurisdiction of
2525 him or that it did not have jurisdiction of the subject matter of the proceedings upon which the said commitment was based.

(c) The petition shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein pursuant to Section 268 of the Judicial Code, in which it had and exercised jurisdiction of the person of the petitioner, has duly and regularly convicted the petitioner of contempt of Court and duly and regularly sentenced him therefor to the term of im-
2526 prisonment specified in the commitment under which this respondent took him into custody as alleged in the petition; and no Court or Judge has jurisdiction or authority by habeas corpus to set aside or nullify such conviction or sentence.

IV. Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, there was not pending awaiting decision any order or judicial de-

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termination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change. The allegations of sub-division k of paragraph 17 of the petition are true, except that it is a fact that the petitioner on and prior to the date mentioned therein was and ever since has been a member of the bar of said Court, duly admitted to practice therein. The information and the order of November 20, 1919, of which copies 2528
are annexed as parts of Exhibit A to the petition, speak for themselves, reference is hereby made thereto, and this respondent denies the legal effect sought to be attributed to such information and order by sub-divisions r and s of paragraph 17 of the petition. Except as in this paragraph of this return expressly admitted, this respondent denies each and every allegation contained in paragraphs 2, 17 and 19 of the said petition.

V. On March 15, 1920, the petitioner moved the Court to designate a Judge other than a Judge 2529
of the Southern District of New York to hear the contempt proceedings against the petitioner, or if such a Judge were not available that the Court designate a Judge of the Southern District of New York other than the Judge before whom or as to whom the alleged contempt was said to have been committed. The motion was overruled and the petitioner excepted thereto. Other than as in this paragraph of this return expressly admitted, this respondent denies each and every allegation contained in paragraph 11 of the petition. Further

2530 answering the petition, this respondent alleges that at no time during the pendency of the contempt proceedings in the District Court of the United States for the Southern District of New York was any affidavit filed under or any step taken in accordance with Section 21 of the Judicial Code by or on behalf of the petitioner.

VI. Exhibit H to the petition, referred to in paragraph 18 thereof, is not a transcript of the testimony of the petitioner; but consists of extracts
2531 containing parts of the testimony of the petitioner given upon his trial in the District Court of the United States for the Southern District of New York on the charge of contempt of Court, arranged in argumentative form, with sub-headings inserted therein taken from a brief of counsel for petitioner submitted to said Court.

VII. Further answering the petition, this respondent shows that: On December 2, 1919, the petitioner failed to appear in person in the District Court of the United States as required by the order
2532 to show cause of November 26, 1919, of which a copy is contained in Exhibit A to the petition. Thereupon, the United States Attorney, on December 2, 1919, moved the Court to issue a warrant of attachment for the arrest and production of the petitioner in person before said Court to answer the information. The Court reserved decision on that motion and on December 23, 1919, made and filed a memorandum in said contempt proceedings in which it was stated that if the petitioner (defendant) entertained the view that his appearance in person might waive his challenge of the jurisdiction of the Court, then the Court would grant the

motion of the United States Attorney for the issuance of such attachment. In said memorandum it was further stated that, in order to allow the defendant full opportunity to determine what course he would pursue, the Court set down December 29, 1919, for the appearance of the defendant and would not issue the attachment unless at that time the defendant had failed to appear. On December 29, 1919, the petitioner (defendant) by his attorney entered a general appearance in said proceedings and, after discussion between counsel for the petitioner and for the United States and the Court, the Court set down the cause for hearing on January 7, 1920, and announced that unless the petitioner appeared at the latter time in person in Court, a body attachment would forthwith issue for him. On January 7, 1920, by stipulation, the matter was adjourned, without prejudice to either party, until January 17, 1920. On January 17, 1920, the petitioner appeared in person in said Court, was duly and regularly arraigned in open Court upon said information, and was paroled in the custody of his counsel. Thereafter, a demurrer of the petitioner to the information having meanwhile been overruled, on the 15th day of March, 1920, the petitioner was duly and regularly arraigned in said Court and in open Court pleaded not guilty to the information, a copy of which is annexed to the petition as a part of Exhibit A thereto; that thereafter he was duly and regularly tried and convicted by said Court of the offense charged in said information; and that on the 24th day of February, 1921, after his said conviction, he was in open Court sentenced by said Court, as a punishment for the contempt of which he had been

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so found guilty, to serve a term of sixty days in the Essex County Jail at Newark, New Jersey.

VIII. In accordance with and pursuant to the provisions of Section 5546 of the Revised Statutes of the United States, as amended by the Act of March 3, 1901 (31 Stat., 1450), the Attorney General of the United States, by a letter addressed to the United States Attorney for the Southern District of New York, dated May 7, 1919, and the District Court of the United States for the Southern
2537 District of New York, by an order dated May 13, 1919, designated the said Essex County Jail as the place of confinement for defendants sentenced in the Southern District of New York for terms of imprisonment for less than six months, copies of which letter and order are hereto annexed marked Exhibit I, and such designations are and ever since the respective dates thereof have been in full force and affect. This respondent's custody of the petitioner complained of in the petition was by virtue of and in obedience to, and the true cause of the detention of the petitioner was, a commit-
2538 ment duly and regularly issued out of the said Court requiring this respondent to take the petitioner into custody for the purpose of imprisoning him in the said Essex County Jail in execution of said sentence, a copy of which is hereto annexed as Exhibit II.

IX. Further answering the petition this respondent alleges that all the issues raised thereby with respect to the said proceedings in the District Court of the United States for the Southern District of New York to punish the petitioner for contempt of Court, or with respect to the validity or

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lawfulness of such proceedings, were raised by the petitioner in the course thereof, evidence was received thereon, he was duly heard thereon, the same were thereupon each duly determined by said Court adversely to the petitioner, its adjudication that the petitioner was guilty of the contempt charged in the information has never been reviewed or reversed by any appellate Court, and such adjudication remains in full force and effect.

X. This respondent has produced before your Honor the body of the petitioner as commanded by 2540
the writ of habeas corpus herein, and prays that the said writ be dismissed and that the petitioner be remanded to this respondent's custody to be dealt with in accordance with the said commitment.

Dated March 3, 1921.

Respectfully submitted,

THOMAS D. McCARTHY,
United States Marshal for the
Southern District of New York, Respondent.

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FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York.

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State of New York,
County of New York,
Southern District of New York, } ss.:

Thomas D. McCarthy, being duly sworn, deposes and says that he is United States Marshal for the Southern District of New York and as such is the respondent herein; that he has read the foregoing return and knows the contents thereof, and that the same is true to the best of his information and belief.

2543

THOMAS D. McCARTHY.

Sworn to before me this
3rd day of March, 1921.

ARTHUR P. LAVERY,
New York County 392.
(Seal) Notary Public,

Filed, with Exhibits I & II attached, April 29, 1921.

2544

2545

Exhibit I.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The designation of the Essex County Jail, Newark, N. J., as the place of confinement for defendants sentenced in this District for terms of imprisonment for less than six months, and the Essex County Penitentiary, Cladwell, N. J., as the place of confinement for defendants sentenced in this District for terms of imprisonment ranging from six months to one year, inclusive.

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Upon reading and filing the annexed letter from the Attorney General of the United States, dated May 9, 1919, to Francis G. Caffey, United States Attorney, New York, N. Y., it is hereby

ORDERED that the Essex County Jail, Newark, N. J., is now designated as the place of confinement for defendants sentenced in this District for terms of imprisonment for less than six months, and that the Essex County Penitentiary, Caldwell, N. J., is designated as the place of confinement for defendants sentenced in this District for terms of imprisonment ranging from six months to one year, inclusive.

Dated, New York, N. Y., May 13, 1919.

2548

DEPARTMENT OF JUSTICE,

WASHINGTON, D. C.

FHD McG-MDB

May 7, 1919.

Mr. Francis G. Caffey,
U. S. Attorney,
New York, New York.

2549 Sir:

The designation contained in letter dated February 28, 1918, addressed to your office, of the Essex County Jail, Newark, New Jersey, as the place of confinement for defendants sentenced in your district for terms of not more than one year, is hereby amended to the extent that the Essex County Jail is designated for defendants who are sentenced to imprisonment for less than six months, and the Essex County Penitentiary, Caldwell, New Jersey, is now designated as the place of confinement for those sentenced for terms ranging from six months

2550 to one year, inclusive.

This change is made in the interest of the long-term prisoners, in view of the fact that the Essex County Jail is not equipped properly to handle prisoners sentenced for six months or over, and the authorities of that jail have requested that no more prisoners be sent them whose terms are for six months or more.

Please present this matter to the Court, and request that these new designations be observed in future sentences, and also that prisoners now held in local institutions under sentence be committed in accordance with this designation.

Respectfully, for the Attorney General,

WM. J. ERIERSON

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Exhibit II.

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court House, in the Borough of Manhattan, City of New York, on the 24th day of February, in the year of our Lord one thousand nine hundred and twenty-one.

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Present—The Honorable JULIUS M. MAYER, Judge.

THE UNITED STATES vs. CHARLES L. CRAIG.	20/121. U. S. Judicial Code, §268. Contempt.

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On motion of the United States Attorney, Ordered sentence.

The Court thereupon proceeds to pass judgment, and sentence the prisoner Charles L. Craig to be imprisoned for a term of sixty days.

Sentence to be executed at the Essex County Jail, Newark, N. J.

An extract from the minutes.

ALEX GILCHRIST, JR.,
Clerk.

A true copy
ALEX GILCHRIST, JR.,
Clerk.

2554 **Traverse to Return to Writ of Habeas Corpus.**

Before—Honorable MARTIN T. MANTON, Circuit Judge of the United States.

In the Matter
of
CHARLES L. CRAIG,
Petitioner.

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To the Honorable Martin T. Manton, Circuit Judge of the United States:

I. Comes now Charles L. Craig, and for denial and traverse to the return of Thomas D. McCarthy, United States Marshal for the Southern District of New York, to the writ of habeas corpus issued herein, in conformity with the provisions of Section 760 of the Revised Statutes of the United States.

2556 II. The petitioner traverses and denies the subject matter set forth in paragraph 2 of the return wherein it is respectfully urged by the respondent that your Honor is and was without jurisdiction or authority to issue any writ of habeas corpus to the petitioner herein; and further traverses and denies that no provision of the laws of the United States vests authority to issue writs of habeas corpus in any Circuit Judge and to the contrary of such contention, your petitioner alleges:

That your Honor had authority at the time that the said writ was issued and now has jurisdiction

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and authority to issue a writ of habeas corpus to the petitioner herein, because the laws of the United States vest authority to issue writs of habeas corpus in a Circuit Judge within his territorial jurisdiction, and the said writ was issued by your Honor as a Circuit Judge of the Second Circuit, within the territorial jurisdiction of the said Circuit, to wit, in the Southern District of New York, and that the respondent has waived any question of jurisdiction by filing his return without having first moved to quash said writ.

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Furthermore, at the time that the said writ was issued, your Honor had been duly designated and appointed on the 18th day of February, 1921, to hold a session of the District Court of the United States for the Southern District of New York, for the trial of causes and the hearing and disposition of such exparte and other business as might come before you during the period beginning February 21, 1921, and ending on March 5, 1921, and that as appears by the designation filed in the office of the Clerk of the District Court on the 18th day of February, 1921, which is hereby made a part hereof, and a copy of which is hereto annexed marked

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Exhibit A, from the said 21st day of February, 1921, up to and including the time of the issuance of the said writ, your Honor was actually attending to all exparte business of the District Court including the issuance of writs of habeas corpus in the place of the District Court Judge ordinarily assigned to dispose of such exparte matters and that, at the time the said writ was applied for, no District Judge was hearing, attending to, or disposing of, any of said exparte matters.

Your petitioner still further avers and alleges that any question of your Honor's jurisdiction or

2560 authority to issue the said writ of habeas corpus in your capacity as Circuit Judge of the Second Circuit, is a moot question, in view of the fact that you had been designated and at the same time and place you were actually acting in the place of the District Judge ordinarily assigned for the transaction of such matters.

III. The petitioner denies that, on the face of the petition on which the writ of habeas corpus herein was granted, it is insufficient in law, and
2561 denies that the petitioner is not entitled thereto, and denies that the writ should, therefore, be quashed; and, on the contrary, alleges that on the face of the petition it appears that the same is sufficient in law and that the petitioner was entitled to said writ and that the writ should not be quashed.

(a) The petitioner denies that the petition for the said writ does not allege facts sufficient to show the proceedings upon which the petitioner was committed, and under which he came into the custody
2562 of the respondent, were not regular or were not in compliance with the Statutes of the United States applicable thereto; and on the contrary, the petitioner alleges that the said writ does allege facts sufficient to show that the proceedings upon which the petitioner was committed and under which he came into the custody of this respondent were not regular and were not in compliance with the Statutes of the United States applicable thereto.

(b) The petitioner denies that the petition does not allege facts sufficient to show that the Court

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which sentenced and committed the petitioner did not have jurisdiction of him or that it did not have jurisdiction of the subject matter of the proceedings upon which the said commitment was based; and on the contrary, the petitioner alleges that the petition does allege facts sufficient to show that the Court which sentenced and committed the petitioner did not have jurisdiction of him, and that it did not have jurisdiction of the subject matter of the proceedings upon which the said commitment was based.

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(c) The petitioner denies that the petition shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein pursuant to Section 268 of the Judicial Code had and exercised jurisdiction of the person of the petitioner. The petitioner denies that the petition shows on its face that the District Court of the United States for the Southern District of New York in proceedings therein pursuant to Section 268 of the Judicial Code has duly and regularly convicted the petitioner of contempt of Court. The petitioner denies that the petition 2565
shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein pursuant to Section 268 of the Judicial Code, has duly or regularly sentenced him for contempt of Court to the term of imprisonment specified in the commitment under which this respondent took him into custody.

On the contrary, the petitioner avers and alleges that the petition shows on its face that the District Court of the United States for the Southern District of New York, in proceedings therein

2566 alleged to be pursuant to Section 268 of the Judicial Code, did not have or exercise jurisdiction of the person of the petitioner, but petitioner admits that it attempted so to do. The petitioner avers and alleges that the petition shows on its face that he was not duly or regularly convicted of contempt of Court. The petitioner further avers and alleges that the petition shows on its face that he was not duly or regularly sentenced to the term of imprisonment specified in the commitment under which the respondent took him into custody.

2567 IV. The petitioner denies that no Court or Judge has jurisdiction or authority by habeas corpus to set aside or nullify such conviction or sentence; and the petitioner alleges in that respect that the Judge by whom said writ was issued has jurisdiction and authority by habeas corpus to relieve your petitioner of unlawful imprisonment contrary to the Constitution and Laws of the United States, and, if need be, to set aside and nullify such conviction or sentence to that extent, and to disregard it as without and beyond the jurisdiction and in ex-
2568 cess of the powers of the Court.

V. The petitioner denies that on October 6, 1919, there was any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the information, still within the control of the District Court of the United States, for the Southern District of New York, or subject to change; and on the contrary, the petitioner avers and alleges that on October 6, 1919, there was no order or judicial determination mentioned in the Information still within the control of the District Court of the United States, for

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the Southern District of New York, or subject to change, except and unless the Court were regularly moved in due course to change the same or to exercise control thereof; and no such application had been made or was then pending.

VI. That this petitioner reavers and realleges each and every averment and allegation contained in Paragraphs 2, 17 and 19 of the said petition, in addition to those expressly admitted in Paragraph IV of the return.

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VII. The petitioner admits that Exhibit H annexed to the petition, which exhibit is referred to in Paragraph 18 thereof, is not a literal transcript of the testimony of the petitioner, but is a transcript of the substance and of the whole thereof with the exception of formal matters, and was annexed to the petition for convenient reference, the portions thereof indicated by quotation marks being literally transcribed from the transcript of the stenographer's minutes.

The subheadings inserted therein by counsel are all plainly indicated therein by italics and contain no argumentative matter. The headings consist solely of a condensation of the petitioner's own phrases as used in his testimony. In addition to the transcript of the testimony of petitioner, contained in Exhibit H, there was presented and submitted to, and left with your Honor at the time that the said writ was applied for, granted and allowed, the original literal transcript of the testimony of the petitioner taken stenographically and all other testimony taken in the proceeding, consisting of three volumes of typewritten matter. The original transcript thus submitted and the ex

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2572 hibits are described in the petition in the following words:

> "All of the evidence in the case is herewith submitted."

VIII. Your petitioner admits that on December 2, 1919, the petitioner did not appear in person in the District Court of the United States, but denies that he failed so to do; he denies that he was required by the order to show cause of November
2573 20, 1919, of which a copy is contained in Exhibit A annexed to the petition, to appear as therein provided, but he admits that the said order assumed to require him to so appear.

On the 2nd day of December, 1919, your petitioner did not appear in person. He appeared by counsel specially, but not generally, to object to the jurisdiction of his person, jurisdictionally to the sufficiency, validity, substance and subject matter of the order to show cause dated November 20, 1919, and the information annexed thereto. Thereupon, the United States Attorney asked the Court
2574 to issue a warrant of attachment for petitioner's arrest and production in person before the Court to answer the said information. The Court reserved decision upon both matters and set down the questions raised by said special appearance of the petitioner and by the motion of the United States Attorney, for argument on December 10, 1919. On the 10th day of December, 1919, such argument was had and on December 23, a memorandum in said proceedings was made by the Court and filed in which it was stated that if the petitioner (defendant) entertained the view that his appearance in person might waive his challenge of

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the jurisdiction of the Court then the Court would grant the motion of the United States Attorney for the issuance of an attachment. In said memorandum it was further stated that in order to allow the defendant full opportunity to determine what course he would pursue, the Court set down December 29, 1919, for the appearance of defendant and would issue the attachment unless at that time the defendant had failed to appear.

On December 29, 1919, the petitioner (defendant) by his counsel, but not in person, appeared and excepted to the said decision, and having so 2576
excepted, appeared generally by counsel, the Court ruling thereupon that the petitioner (defendant) had saved his rights by the exception.

That after discussion, the Court announced on that day as follows:

That on January 7, 1920, at 2 o'clock, he would issue a body attachment forthwith unless at that time the defendant appeared in the Court Room pursuant to the Court's suggestion. On January 7, 1920, by stipulation between counsel the matter was adjourned without prejudice to either party until January 17, 1920.

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On January 17, 1920, the petitioner appeared in person with his counsel before the Court, stating that in view of the ruling above mentioned, the defendant being powerless to resist the process of the Court, reserving his objection and his exception, appeared in person and was then present in Court. Whereupon the defendant was called upon by the Court to plead. Before pleading, the petitioner (defendant) interposed a motion to quash, a copy of which is annexed to the petition marked Exhibit C.

2578 IX. The petitioner denies that he was paroled in the custody of his counsel. The District Attorney suggested that the defendant be released upon his own recognizance or in the custody of his own counsel, whereupon the Court said in the first instance that he was released on his own recognizance but upon your petitioner's counsel asserting that such was entirely outside of any procedure that was known in a contempt proceeding, the Court ruled that it would disregard the point to which the District Attorney referred and that he would
2579 consider the question of recognizance practically wiped from the record.

That subsequently the petitioner's (defendant's) motion to quash was overruled. That a demurrer was interposed, copy of which is annexed to the petition marked Exhibit D, and after argument, the demurrer was overruled. The defendant (petitioner) excepted to the decision overruling the demurrer. Petitioner then moved for a trial by jury on the ground that the alleged contempt is not of the kind, character or nature which by the terms of the Act is triable by the Court as a summary proceeding,
2580 but on the contrary, is of that kind, character and nature which under the Statute is triable by a jury. This motion was denied, to which the defendant (petitioner) excepted. Defendant (petitioner) then moved that the Court designate a Judge other than a Judge of the District Court to hear the proceeding. This motion was denied, to which the defendant (petitioner) excepted.

That on the 15th day of March, 1920, the defendant (petitioner) filed a plea of Not Guilty (a copy of which is annexed to the petition and part of Exhibit A thereto). Then both of the motions were

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restated and denied and an exception again taken by the defendant.

X. That except as hereinbefore expressly admitted, the defendant denies each and every allegation contained in so much of paragraph 7 as is hereinbefore referred to.

XI. That the petitioner denies that he was duly or regularly tried and avers and alleges that he was not duly or regularly tried; but that on the contrary, the Court had no jurisdiction to try him and 2582
exceed its powers in so doing. The petitioner denies that he was convicted by said Court of the offense charged in said information, but admits that the Court assumed to convict him and avers and alleges that his alleged conviction was beyond the jurisdiction of the Court and in excess of its powers and in violation of the laws of the United States.

XII. The petitioner denies that he was sentenced by said Court, but admits that the Court assumed to pronounce sentence and avers and alleges that the alleged sentence was without jurisdiction and 2583
in excess of the powers of the said Court. The petitioner denies that he was sentenced by the said Court as a punishment for the contempt of which he had been found guilty, as alleged in the Return, but admits that the Court assumed to find him guilty, and alleges and avers that no contempt had been or has been committed by him and that the act which is alleged in the Return as a contempt was not within the jurisdiction of the Court and the alleged finding of the Court as set forth in said Return that he was guilty was in excess of the

2584 powers of the Court, and in violation of the laws of the United States.

XIII. The petitioner denies that the respondent's custody of the petitioner, complained of in the petition, was by virtue of or in obedience to a commitment duly or regularly issued out of said Court, and denies that the true cause of the detention of the petitioner was a commitment duly or regularly issued, and the petitioner alleges and avers that the said commitment was not duly or regularly issued
2585 out of the said Court, but was issued or attempted to be issued without jurisdiction and in excess of the powers of the Court and in violation of the laws of the United States.

The petitioner alleges that the Court pronounced orally on the said 24th day of February, 1921, in the presence of the petitioner and of his counsel and the United States Attorney and respondent that the defendant (petitioner) be confined in the Essex County Jail in Newark, New Jersey, for sixty days; whereupon the respondent was directed to take the defendant into custody and the respondent did so
2586 accordingly and while so detained in the respondent's custody, the petitioner caused the writ of habeas corpus hereinbefore referred to, to be applied for and it was allowed and issued by your Honor and forthwith served upon the respondent in person, who forthwith produced the petitioner before your Honor.

XIV. Petitioner denies that all the issues raised with respect to the said proceedings in the District Court of the United States for the Southern District of New York, to punish the petitioner for contempt of court were raised by the petitioner in the

course of said proceedings, but petitioner admits, avers and alleges that he attempted to raise the same in the course thereof. Petitioner denies that all the issues raised with respect to the validity and lawfulness of such proceedings, were raised by the petitioner in the course thereof, but the petitioner admits, avers and alleges that he attempted so to do. The petitioner denies that evidence was received on the issues raised by his petition herein and alleges and avers that there was no legal or competent evidence received before the Court of the facts or acts attempted to be adjudicated by said Court. That the petitioner admits, however, that witnesses were examined. 2587 2588

XV. Petitioner denies that the issues raised by the petition herein were duly determined by said Court or were duly determined adversely to the petitioner, and avers and alleges that no issue was duly determined by said Court adversely to the petitioner and that the alleged determination was without any legal or competent evidence of the facts or acts and was without and beyond the jurisdiction of the Court and in excess of its powers and was in violation of the laws of the United States. The petitioner denies that the alleged adjudication set forth in the Return remains in full force and effect, and the petitioner avers and alleges that such alleged adjudication does not remain in full force or effect and that there was no legal or competent evidence in support of the said alleged adjudication and that the said alleged adjudication was without and beyond the jurisdiction of the Court, in excess of its powers, in violation of the laws of the United States, and is null, void and of no force or effect. 2589

2590 XVI. That at the time of the making and filing of the Information set forth in your petitioner's petition for a writ of habeas corpus and for a long time prior thereto, there was a law of the United States generally known and designated as Section 268 of the Judicial Code, reading substantially as follows:

> "Said Courts (meaning the Courts of the United States) shall have power to impose and administer all necessary oaths, and to
2591 punish by fine or imprisonment, at the discretion of the Court, contempts of their authority; provided that such power to punish contempt shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said Courts, in their official transactions and the disobedience or resistance of any such officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule,
2592 decree, or command of the said Courts."

That the petitioner had not committed nor been guilty of any misbehavior in the presence of said Court, or so near thereto as to obstruct the administration of justice nor of disobedience or resistance to any lawful writ, process, order, rule, decree or command of the said Court at any time prior to the making or filing of the said Information; that the said Information did not set forth or allege that your petitioner had committed or been guilty of any such act; that the alleged misbehavior with which your petitioner was charged

and for which he was committed was not such as under the provisions of the said law made him liable to fine or imprisonment. That in fact, no contempt had been committed, and the said Information did not show that any contempt had been committed; that there was no legal or competent evidence before the said Court that your petitioner had committed or been guilty of any such act; that the alleged order and adjudication did not establish that any contempt had been committed; that the alleged or purported order, adjudication, sentence and commitment and each of them set forth in the petition and in the return was without jurisdiction and in excess of power and that the same were and each of them was in violation of the laws of the United States, to wit, the law above referred to, among others.

That the alleged contempt with which your petitioner was charged consisted solely and wholly of the writing of a letter which was and is set out in the Information, which letter, upon its face, shows that it was not contemptuous in form or substance; that the said letter was written by your petitioner in his official capacity as Comptroller of the City of New York and as a member of the Board of Estimate and Apportionment of said City to the Public Service Commissioner for the First Judicial District in the State of New York, in the discharge or attempted discharge of an official duty, and as such was a privileged communication.

That there are exceptional conditions and circumstances that warrant and justify the resort to a writ of habeas corpus in this proceeding rather than, or in preference to, a review of the proceedings of the District Court by some other procedure,

2596 method or means, if any such there be. That such exceptional conditions and circumstances are that the petitioner is the duly elected Comptroller of the City of New York and as such, a member of the Board of Estimate and Apportionment, which facts are set forth in the petition for the writ, and as such, has the daily and constant care and management of the finances of the City of New York, and the consideration of vast projects of the City before the Board of Estimate and Apportionment, which meets weekly and sometimes oftener and in
2597 which said Board of Estimate and Apportionment there are a number of subjects that cannot be passed upon by law without the vote of your petitioner; that your petitioner's presence at meetings of the Sinking Fund Commission, which meets every two weeks is expressly required by law to constitute a quorum; that there are frequent meetings of boards and bodies and a large number of committee meetings, all of which require the constant time and attention of your petitioner in one or the other of said capacities of your petitioner.

2598 That at the present time and for a period since long prior to the writing of the letter set out in the Information, the question of the interests of the City, financially and otherwise, in matters relating to rapid transit, have been uppermost in the minds of the people of the community and of daily comment in the Press. That the direct financial interests of the City in such matters are vast, in amount running into hundreds of millions of dollars. That all of the people and all of the parties insist that the rapid transit problems ought to have been settled or ought to be settled by the Board of Estimate and Apportion-

ment, or that new laws should be enacted for the settlement of such questions by new means. 2599

There is now pending before the Legislature of the State of New York, bills aimed at the practical elimination of the Board of Estimate and Apportionment from the traffic situation. In all of such matters, the petitioner has taken and is taking a daily and active part and is expected by his constituents and by the public at large to take an active part. That there have been and are numerous actions and proceedings in the courts relating to the rapid transit situation. 2600

That it is available and necessary for the petitioner to perform his duties without fear or favor and without being subjected to proceedings for contempt of court, and to know definitely and finally whether such acts as are alleged in this proceeding, are within or beyond the due performance of his duty.

That the term of office of your petitioner expires at the end of the present calendar year, and that your petitioner is informed and believes that if a speedy determination of these matters is not reached by means of a writ of habeas corpus the questions involved cannot be finally determined before the expiration of his term of office. 2601

By way of further denial the said petitoiner alleges that upon its face the return of the respondent shows that petitioner is entitled to a discharge from the unlawful detention in which he is now held by the said respondent and that accordingly he prays as prayed in his petition, that he may be discharged from such detention.

CHARLES L. CRAIG,
Petitioner

2602

State of New York,
County of New York,
Southern District of New York, } ss.:

Charles L. Craig, being duly sworn, deposes and says that he is the petitioner in this proceeding and the person named in the foregoing traverse and denial subscribed by him. That he has read the same and knows the contents thereof and that the said statements made are true as he verily believes.

CHARLES L. CRAIG.

2603 Subscribed and sworn to before me this 11th day of March, 1921.

GEO. T. VAN VALKENBURGH,
Notary Public,
New York Co.

Filed, with Exhibit A attached, April 29, 1921.

Exhibit A.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

2604 In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge MARTIN T. MANTON to hold a session of the District Court of the United States for the Southern District of New York for the trial of causes and the hearing and disposition of such ex parte and other business as may come before him during the period beginning February 21, 1921, and ending March 5, 1921.

Dated, February 18, 1921.

H. G. WARD,
Senior Circuit Judge of the Second Circuit.

Statement of Facts. 2605

Before—Hon. MARTIN T. MANTON,
United States Circuit Judge.

In the Matter of CHARLES L. CRAIG, Petitioner.	Statement of Facts.

2606

BE IT REMEMBERED that on the 24th day of February, 1921, the above entitled matter came on to be heard before the Honorable Martin T. Manton, United States Circuit Judge, in and for the Second Circuit, at which time and on the subsequent dates below mentioned to which adjornment of the above entitled matter was duly taken, the following procedings were had.

February 24, 1921.

APPEARANCES:

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FRANCIS G. CAFFEY, United States Attorney for Thomas D. McCarthy, United States Marshal.

DAVID V. CAHILL, Assistant United States Attorney, of Counsel.

JOHN P. O'BRIEN, Corporation Counsel of the City of New York, for the Petitioner.

EDMUND L. MOONEY, Esq., of Counsel.

The United States Marshal produced the petitioner, Charles L. Craig, as required by the writ forthwith before Judge Manton in his Chambers.

2608

Mr. Caffey asked for time in which to prepare and file a return. Thereupon the proceedings were adjourned to the 3rd day of March, 1921, the petitioner being paroled in the custody of his counsel.

March 3, 1921.

Same appearances.

Mr. Caffey stated that the return of Thomas D. McCarthy, United States Marshal for the Southern
2609 District of New York to the writ had been prepared but had not yet been certified by the Marshal and it was agreed that an adjournment should be taken until March 12, 1921, at 10 A. M. in order to afford an opportunity for the certification of the return.

The following proceedings were also had:

The Court: Now, before doing that, Mr. Mooney, do you want this presented to me as Circuit Judge, or do you want to submit it to me as Circuit Judge, sitting in the District Court?

Mr. Mooney: I have had to present it to your
2610 Honor as a Circuit Judge but I nevertheless do offer to put in proof in a formal way, or to ask your Honor to take judicial notice of the fact that you were at that time designated as a District Judge. You were a Judge at that time—

The Court: The point that I am going to ask you to decide, if you will—the papers are entitled as a Circuit Judge. I am now sitting as a Circuit Judge in the District Court. I just had the question up in another case, the Lamar case, and I wanted to let you decide for yourself.

Mr. Caffey: It has to do with the question whether after a final decision the party adverse

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to whom the decision is rendered, will be entitled to an appeal, and therefore, Mr. Mooney should take a position one way or the other now.

Mr. Mooney: I am taking it. I never have any doubt as to what position I am going to take. I am going to take my position exactly as it was when I started, and I am going to keep it but I am going to do a little bit more than that. I am going to take such a course with regard to the proofs as will render the point suggested by Colonel Caffey an entirely moot or academic point. I shall insist that we shall proceed in the way that we started, and that we proceed in that way to the end.

2612

The Court: All right.

Mr. Caffey: Oh, I gave notice to Mr. Mooney at the time the writ was signed that I shall raise the question of the power or authority of the Circuit Judge to issue a writ of habeas corpus.

The Court: We will set the matter down for a week from Saturday at 10 o'clock.

Whereupon an adjournment was taken to Saturday, March 12, 1921, at 10 A. M.

2613

March 12, 1921.

Same appearances.

The return of Thomas D. McCarthy, United States Marshal, to the writ having been duly filed, a traverse thereto was filed in behalf of the petitioner.

The following occurred:

Mr. Caffey: If your Honor will permit me, I would like to go into this question of jurisdiction at some length.

The Court: All right, Colonel.

2614

Mr. Mooney: We raise a preliminary point in that respect, your Honor, that by filing a return the District Attorney has waived an objection to the jurisdiction, which should have been by motion to quash. We stated that upon the record, so that we may proceed with what seem to be regular steps.

The Court: I will consider that when the time comes. Now, Mr. Caffey—

Mr. Caffey: I would say, while it is on my mind, in response to what has just been stated in the first

2615 place upon the question of power, there can be no waiver. In the second place, at every stage of the proceedings, commencing with the appearance in your Honor's Chambers on February 24th in the return itself, on the previous hearing held March 3rd, and throughout, I have given notice that I insisted upon this question and, therefore, as a matter of fact there could not have been any waiver. In the third place, even if, as I shall proceed to argue, the document headed "Writ of Habeas Corpus," signed by your Honor, as Circuit Judge on February 24, 1921, had been absolutely void as a

2616 writ of habeas corpus, due respect for your Honor, as a Circuit Judge, as well as perhaps the provision of Section 753, I think it is, of the Revised Statutes, suggested and required that the Marshal immediately respond to the requirements of that order; therefore, there can be no waiver.

Now, I move first to dismiss the proceeding upon the ground that a Circuit Judge of the United States has no jurisdiction or power to grant or issue a writ of habeas corpus, or to discharge on a writ of habeas corpus.

Secondly, I move to vacate and quash the paper of February 24th, 1921, signed by your Honor as Circuit Judge and entitled "Writ of Habeas Cor-

2617

pus" upon the grounds, that there was no power to grant or issue a writ of habeas corpus vested in a Circuit Judge of the United States;

Thirdly, I move to vacate and quash the said paper upon the ground that it was improvidently signed;

Fourthly, I move to vacate and quash the said paper upon the ground that it is insufficient as process to institute habeas corpus proceeding;

Fifthly, I move to vacate and quash the said paper upon the ground that it is irregular and void, in that it is not addressed to the Marshal or to any 2618
one; it is not signed by the Clerk of any court; it is not signed by the Clerk of the District Court; it is not under the seal of any court; it is not returnable to the District Court. It is made returnable before your Honor as a Circuit Judge; and it is not tested either in the name of the Chief Justice of the United States or the Senior Judge of the District Court.

Argument was had in support of the said motion and in opposition thereto.

An adjournment was duly taken to March 19, 1921, at 10 o'clock. 2619

March 19, 1921.

Same appearances.

The Court: Now, first of all, I have considered the memoranda which were submitted by counsel representing Mr. Craig and the Government, and I shall hold as follows: I shall deny the motions made by the Government to dismiss the proceeding upon the ground that the Circuit Judge of the United States has no jurisdiction or power to grant or issue a writ of habeas corpus, or to discharge

2620 on a writ of habeas corpus; and further, I shall deny the motion to dismiss, vacate and quash the paper of February 24, 1921, signed by the Circuit Judge, entitled "Writ of habeas corpus," which motion is made upon the ground, first, that there was no power to grant or issue a writ of habeas corpus vested in a Circuit Judge of the United States; second, that it is improvidently signed; third, that it is insufficient as a process to institute a habeas corpus proceeding; fourth; that it is irregular and void, in that it is not addressed to a marshal or to
2621 anyone, and that it is not signed by the clerk of any court and that it is not signed by the clerk of the district court; that it has no seal of any court, and is not returnable to the Distict Court, and that it is not tested either by the Chief Justice of the United States, or by the senior judge of the District Court.

At a later time I shall state my reasons in a written memorandum.

Mr. Cahill: May it please the Court, we except to your Honor's rulings on each of the motions, and to your Honor's rulings on each of the parts
2622 of this motion, and we now move that your Honor proceed to hear this application as a District Court. The purpose of that I think is apparent to your Honor, and it will serve the purpose of one side as well as the other; it will save to both the right of review, whatever your Honor's determination will be.

The Court: I think that lies largely with the applicant, what do you wish to do about it, Mr. Mooney?

Mr. Mooney: Our position is, your Honor, that the writ is issued by you as a Circuit Judge. In addition thereto, you were designated formally under the statute, and under that form of designa-

2623

tion you had the power and the duty in chambers of doing the act and proceedings of a District Court judge, and we therefore claim that there was super-added to your powers, if necessary, the powers and activities of a District Court judge, but you were sitting in chambers and the case is not at all unlike the old case of In re Dock Bridges, in which Mr. Justice Bradley sat, and which is headed in the report, in very large letters, "In chambers."

We insist that this proceeding shall be conducted in the way that as a matter of physical act and fact, as well as in the matter of the exercise of judicial powers, the proceeding was initiated, namely, this is a chambers matter. It was presented to you as a chambers matter, and should proceed to the end as a chambers matter.

2624

The Court: Well, you oppose the application?

Mr. Mooney: We do.

Mr. Cahill: In that connection, if your Honor please, it has been decided in the case of Harkrader against Wadley, 172 U. S., that if you should proceed as a district court, we would have the right of appeal. If we should so proceed now, it could be converted, in other words, under that authority, into a district court proceeding.

2625

The Court: I think that is true; but after all, I think it lies with the applicant to determine how he wants to proceed. He places his fortunes and misfortunes on that application.

Mr. Cahill: Well, if the Court please, I don't think it rests wholly with him. I think it is in the discretion of the court, the court having been designated to hold the district court, might well now assume jurisdiction of the matter as a district court in order to reserve to both parties the right of appeal.

2626

The Court: I think it lies altogether with him. He may apply to a judge or he may apply the court. If he sees fit to apply to the judge, he takes his chances.

Mr.Cahill: We except to your Honor's denial of our application.

The Court: I deny the application in view of the opposition.

Mr. Cahill: Now, if the Court please, I think it would be proper at this time for us to argue a little further our motion to dismiss for insufficiency of
2627 the pleadings. This has not been argued at all, although it has been raised in our return.

The Court: You have argued it on your brief.

Mr. Cahill: Not this particular question that I refer to.

The Court: Yes.

Mr. Cahill: On the brief submitted last Wednesday?

The Court: Yes.

Mr. Cahill: Oh, no. We raised there simply the question of your Honor's power to grant the writ and questioned the sufficiency of the writ itself.

2628 The Court: That is what I thought you referred to.

Mr. Cahill: No. Now, the point I raise is simply this, that taking the pleadings as they stand, the writ must be dismissed for insufficiency of the pleadings, upon the ground that the pleadings themselves show that the trial court had jurisdiction and that there is no other question before the court.

Mr. Caffey: The insufficiency of the pleadings is the issue that is before your Honor on this motion made by Mr. Cahill. This motion is practically a motion to dismiss on the pleadings.

The Court: I think Mr. Mooney has got the lab-

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oring car, and I think it may be well to let him argue first, to hear him first.

Counsel for the petitioner Craig then offered to prove that Judge Manton was designated to hold the District Court at that time when he issued the habeas corpus.

The Court: As to the testimony, do you object to that testimony going in?

Mr. Caffey: I certainly do, your Honor, on this law question. This law question will determine whether any of that testimony is admissible.

2630

The Court: Your motion now is to dismiss?

Mr. Caffey: On the pleadings.

The Court: That motion is denied.

Mr. Caffey: Exception.

The Court: Now then put in whatever you wish to offer.

Mr. Mooney: I wish to say at this juncture, if your Honor please, that I don't think any of these questions in the habeas corpus proceedings could be raised upon a motion to dismiss, and I do not wish by my conduct or by my argument to assent to any such practice as has been attempted to be introduced by the learned counsel for the govern-

2631

ment.

The Court: I have ruled in your favor now.

Mr. Mooney: I know your Honor has, but I wish to safeguard my rights in that respect.

We offer in evidence here the testimony taken in the court below upon the hearing which resulted in the sentencing of the petitioner, and the whole thereof.

The Court: Is there any objection to the fact that that is a true copy?

Mr. Cahill: No, we do not object to it on that ground, but we object to it as immaterial and irrelevant.

2632

The Court: Let us get it on the record. It is conceded, first, that what counsel is offering is a correct transcript of the proceedings before Judge Mayer.

Mr. Caffey: The evidence is not the whole record.

The Court: Objected to as incompetent, irrelevant and immaterial. That objection is overruled. Exception.

Mr. Mooney: It consists of two volumes.

(The papers offered were then marked Craig
2633 Exhibits 1 and 2, being the minutes of the trial before Judge Julius M. Mayer.)

Mr. Caffey: To shorten the matter, the matter of identification of all these exhibits and all these records we will assume as a matter of course that they are brought on now by this offer. We need not take the time of the court to physically identify them.

The Court: Put in all the exhibits—it is stipulated that all the exhibits which were used before Judge Mayer may be used upon this hearing. Counsel for the Government objects upon the
2634 ground that they are incompetent, irrelevant and immaterial. That objection, is overruled, and an exception is allowed to the Government.

Mr. Mooney: And my offer in that respect is that those exhibits are here and now offered in evidence before your Honor.

The Court: Yes, they are received. Exception to the Government.

Mr. Mooney: Now, there is one other thing. Colonel Caffey, and that is will you stipulate that the testimony that has been offered in evidence and the exhibits that have been offered in evidence are fore Judge Mayer?

the whole record of the testimony and exhibits be-

2635

Mr. Caffey: Well, I have not looked at it. I am presume it is the whole, and the whole of it must be before you. I am raising no technical objections at all about calling the stenographer to prove this is the record and all that sort of thing.

The Court: Suppose you run through those exhibits and see if there are any left out.

Mr. Caffey: I know that is not all. Why, that is just a minor fraction of the exhibits.

Mr. Mooney: That does not include the Government's Exhibits. Those are our Exhibits, and the Government's are listed on a separate sheet.

2636

The Court: Then the Government exhibits, I take it, will be submitted later?

Mr. Mooney: Yes.

Mr. Caffey: They are down in the clerk's office and it is up to them to submit them.

The Court: Will it be stipulated then by counsel that the clerk of the District Court will submit all the exhibits which are there? Does that cover it all?

Mr. Mooney: Yes.

Mr. Caffey: I will submit anything, sir, I have here.

2637

Mr. Mooney: Yes, as part of this record.

Mr. Caffey: I don't want to say they are all without looking at them. I am not going to be precluded by it.

The Court: No, I am not binding you by it at all.

Mr. Mooney: No. Colonel Caffey, you miss my point. My point now is I want to put a witness on the stand. Mr. Tarbox can take the stand, or you can make the concession that the stenographer's minutes that have been offered in evidence and the exhibits as marked by the clerk are the record and the whole thereof as it was before Judge Mayer,

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The Court: Those are the Craig exhibits, are they?

Mr. Mooney: Yes, sir.

The Court: Now, the Government exhibits are downstairs in the Clerk's office?

Mr. Mooney: Yes, sir. There is no trouble about that at all, your Honor. I want to get at the question that this is the evidence and the whole thereof.

Mr. Caffey: Of course there was no evidence except what appears in the stenographer's minutes.

2639 Mr. Mooney: And these exhibits.

Mr. Caffey: And the exhibits.

Mr. Mooney: That is satisfactory.

Mr. Mooney offered in evidence a stenographic transcript of all of the testimony taken and all of the exhibits, both the Government's and the petitioner's, in the contempt proceeding.

Counsel for the Government objected to the admission of same on the ground that they were immaterial and irrelevant.

The objection was overruled to which counsel for the Government excepted.

2640 Mr. Mooney then proceeded to argue on the merits.

Now, we wish to present these jurisdictional points to your Honor, keeping closely within the confines of the proper office of a writ of habeas corpus, upon the following four heads or propositions: That there was no jurisdiction to punish for contempt and that the court acted in excess of its powers, and without any evidence of contempt, upon the following grounds or subdivisions. First, the communication was privileged, and incidentally, that there was no publication of it. Secondly, that the matter contained in the letter was not contemptuous in substance. Thirdy, that there was

2641

nothing pending subjudice at the time the letter was written and as to that, there is an astonishing admission in the return to this writ of habeas corpus, which is sufficient in itself to sustain the writ. And fourth, that there was no misbehavior such as to obstruct the administration of justice. Fifth, the matter that I have referred to before, that there was no prayer to the information, which is a pro cedural matter.

Now, in turn, we expect to sustain those points by the following procedural points:

2642

(A) That the habeas corpus is the proper remedy.

(B) That the Circuit Court Judge may issue the same, and under that head, that he has super-added powers in this case of a judge of the District Court under the formal designation.

(D) That any judge may issue the writ, and

(C) That the return to the writ confesses or admits one of the main points, and an all-sufficient point for the granting of the writ, namely, that there was nothing pending sub judice.

2643

WILLIAM TALLMAN was called as a witness in behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination by Mr. Mooney:

Q. Mr. Tallman, will you state your official capacity, please? A. I am the chief deputy clerk of the United States District Court for the Southern District of New York.

2644

Q. And were you such, and have you been such, for a number of years, have you not? A. I have.

Q. Have you, pursuant to the request of the petitioner's counsel, produced here a resignation of Honorable Martin T. Manton, on file in the office of the Clerk of the Court?

The Court: Mr. Caffey will concede that.

A. I have.

2645

Mr. Caffey: Why, certainly. There is a correct copy of it attched here to the return. I will concede that, but I merely wish to raise the legal question that it is immaterial and irrelevant in this proceeding, and that on its face it shows that it has expired.

Mr. Mooney: Well, there is nothing in the point.

The Court: I don't know what you mean. Of course, you are trying to take advantage of this assignment, I take it.

Mr. Mooney: In other words, I want to super-add this assignment.

2646

The Court: Then put it in evidence.

Mr. Caffey: I take an exception.

The Court: Mark it in evidence.

(Paper considered, marked Petitioner's Exhibit No. 3.)

Mr. Caffey: I will stipulate that the copy of the assignment that is annexed to the traverse of the return, is a correct copy of the original.

The Court: On file in the office of the clerk?

Mr. Caffey: On file in the office of the clerk.

2647

The Witness: I would rather not have this marked, Mr. Mooney.

Mr. Mooney: All right, that is satisfactory. All right.

Q. Now, Mr. Tallman, will you please state whether—

The Court: Don't you want to put in proof as to when this proceeding started?

Mr. Mooney: Yes, sir, I am going to do that. Perhaps, we had better do it at this juncture. It is the 24th day of February—that is conceded—that the writ was issued, on the 24th day of February, 1921?

2648

Mr. Caffey: Oh, yes; I concede that the date as shown by this paper is the actual date.

Q. Mr. Tallman, will you state please, whether following the filing of this designation in the office of the clerk and on the 24th day of February, 1921, Judge Manton was actually engaged in the performance of business of the District Court and of the District Judge?

2649

Mr. Cahill: If the Court please, the same objection is made to that evidence, to this whole line of testimony.

The Court: I will take it.

Mr. Cahill: Exception.

Q. And, on the 24th day of February, 1921, will you state please, whether the business was being transacted by Judge Manton in open court, or in chambers? A. It was being transacted in chambers.

2650

Mr. Cahill: If the Court please, the same objection is made to this whole line of testimony.

The Court: Objection overruled; exception.

Q. Had there been a session of the District Court during the period of the designation just prior to that day, and if so, when? A. On the 21st day of February, the bankruptcy motion calendar was handled by Judge—presided over by Judge Man-
2651 ton, and on the next day, the 22nd or—on the 23rd day of February, the following Wednesday, he had a naturalization hearing according to my best recollection.

The Court: What do you want this for?

Mr. Mooney: I want to meet my learned friend's academic point by a physical demonstration.

The Court: I know. Even assuming that there is something in what you are claiming, the fact that there is an assignment is
2652 enough.

Mr. Mooney: I want to cover it more than that, if I may be permitted, Judge. I want to show not only that Judge Manton was performing the duties, but that nobody else was performing the duties on that day. I want to present the actual picture very briefly.

The Court: Very well.

Q. Will you look at this paper and say whether that is a summary of the business transacted by Judge Manton in the chambers on the 24th, as

2653

published in the Law Journal, the succeeding day? A. It is.

Mr. Mooney: I would like to have that marked in evidence.

Mr. Cahill: The same objection.

The Court: Objection overruled. Exception.

The exhibit is annexed hereto, marked "Exhibit 3."

Mr. Mooney: You make no objection to the fact that it is from the Law Journal instead of from his recollection? 2654

Mr. Cahill: No.

Q. Now, had Judge Knox been assigned to the holding of that District Court prior to the designation of Judge Manton, if you know? A. Yes, he had.

Q. And Judge Manton was substantially taking his place? A. He was.

Q. Now, on that day, is it a fact that Judge Knox was not passing upon current business?

2655

The Court: What do you mean by that?

Q. That is to say, Judge Knox's duties were confined to the business that was pending at the time that Judge Manton's designation was filed? A. Well, that is substantially correct, yes.

Q. In other words, Judge Knox was not attending chambers' business of the District Court on the 24th day of— A. He was not.

Q. And was anybody else, that is to say, was any other judge attending to chambers' business in the District Court or of its District Court Judge on the 24th day of February, 1921, except Judge Manton? A. No.

2656

Mr. Mooney: Is that satisfactory to you, Colonel Caffey?

The Witness: I would like to make this modification, that the Judge, according to the Law Journal, Judge Knox did sign three orders, which I looked up, and I found that one of them had to do with the bankruptcy proceedings, or an equity receivership in which he appointed a receiver, and therefore retained control of it. And the other two were bankruptcy orders in which he had previously decided the matters, and they were orders having to do with matters he had decided.

2657

The Court: Is that all, now?

The Witness: That is all.

Q. In this district, write of habeas corpus usually submitted to the judge holding chambers, are they? A. They are.

Mr. Cahill: Same objection.

The Court: Objection overruled.

Mr. Cahill: Exception.

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Mr. Caffey: Mr. Mooney. your questions imply that Judge Manton signed this paper, dated February 24, 1921, headed Writ of Habeas Corpus, in chambers. Do you concede that that was a fact?

Mr. Mooney: Yes, sir. In fact, I wish to prove it a fact.

Mr. Caffey: Yes, you implied it.

Mr. Mooney: I am going to do that as a next step, so that this is not only a concession, but a stipulation by attorney, that this writ of habeas corpus was presented before Judge Manton in chambers, and that he signed it in chambers.

2659

Mr. Caffey: Will you stipulate also that I appeared there in response to messenger and I raised an objection that he had no power to grant the writ of habeas corpus?

Mr. Mooney: Yes, that is a fact. That is all, thank you, Mr. Tallman.

The Court: Is that all the proof you want to put in?

Mr. Mooney: That is all the proof, sir.

Mr. Cahill then argued for the dismissal of the writ and Mr. Caffey thereafter made the closing argument for the dismissal of the writ. 2660

The respondent-appellant presents the foregoing statement of the proceedings and evidence together with the evidence in the contempt trial, beginning at page 89 and ending at page 820, and beginning at the middle of page 889 and ending at the middle of page 1128; and requests that the same be certified.

WILLIAM HAYWARD,
United States Attorney for Appellant.

2661

DAVID V. CAHILL,
Assistant United States Attorney,
of Counsel.

Petitioner's Exhibit No. 3.

This exhibit is set forth as Exhibit A Annexed to The Traverse to Return to Writ of Habeas Corpus at page 868, *supra*, and is deemed set forth here without repetition.

2662

Exhibit 3.

New York Law Journal, February 25, 1921.

UNITED STATES CIRCUIT COURT OF APPEALS.

Ford Co. vs. Hotel Woodward—Affirmed.

Armsby vs. Esrom—Reversed.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

2663

By MANTON, J.

In re Carvel SS. Co.—Motion granted.

In re Hubbard, Majestic Doll Co.—Orders of reference signed.

In re Ryweck, Hollister; Ladenburger vs. Burke; In re Am. Process Co., Herrick, Rosenstein, Ellenbogen, Morning Star Corp'n, Caristen, Cohen, Schneider, Workman, Sauer Corp'n, Ash Removals, Inc., Butchick, Romer, Pan-Am. Export Co.; Ladenburger vs. The John Burke; In re Hennevig, Razos Corp'n; Pawling Transp. vs. Coal; Kaisha vs. Cragin; In re German, Robinson; Morey vs. Nippon; In re Stroudsburg Ribbon Mills, Eastern Silk Mills, Silberman, Elk Restraurant Co., Wood Toy Co., Fair Price Poultry Co., Doughten; Guaranty Trust Co. vs. Northern Pac. R. R. Co.; New River Colleries vs. Seider; In re Aetna Garment Co.; Trumboer vs. Machinery Metals; In re Horenstein, Straits Settlement Imp. Corp'n, Kahan; Shipper Nab. Co. vs. Biele; O'Connor vs. Penn. R. R. Co.; In re Westberg; Anglo-South Am. Bank vs. Tatania; South Am. Shipping vs. Midland Coal Co; In re Lett; McLeod vs. Otto; In re Posner; N. Y. & Albany Lighterage vs. Tug Chas. McAllister; In re Black, Refining Concessionaries; N. Y. Life

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vs. Levine; In re Marcus, Rothenberg; Kahan vs. Garvan; In re Wood Toy Co., Wolitzky; Embiricos vs. SS. St. Paul; Freres vs. Same; In re Greenberg; Rubsamen vs. Shultz; Moody vs. Gramm-Bernstein, etc.;Moody vs. Gramm; In re Roberts; Writ vs. Crouch; In re Abrahams; McGusol vs. The Mariboro; Kohn vs. Eimer; In re Plaza Music Co., Supertone Talking Mach. Co. Robinson, Wyllins; Pacific Commercial vs. Wells, Fargo Co.; Keeveny vs. McCormick; In re Wonpat Products Co., Achelis vs. Frank; In re Kananack, Opler, Posner; Gaunt 2666
vs. Mendelsohn; In re McNaught, Marks, Messuri; Central Leather vs. SS. Goyaz; In re Weisz, Levy; Storch vs. Erie R. R.; In re Tropical Sales Co., Abelson, Henrick, Mervis, Ratners Restaurant, Dragon Restaurant—Order signed.

Statement of Contents of Certain Government's Exhibits, in Lieu of Setting Same Forth at Length.

2667

The following statement sets forth, so far as material, the contents of such of the following Exhibits as are therein described:

1. GOVERNMENT'S EXHIBIT 3, is a letter from Lewis Nixon to the District Attorney, dated October 8, 1919, enclosing copies of Government's Exhibits 1 and 2.

2. GOVERNMENT'S EXHIBITS 4, 9, 10, 11, 12, 13, 15, 16, 18, 19, 21, 22, 24, 25 and 28 are copies of New York City papers, containing a copy of the

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to have the record in the litigation printed and bound.

8. GOVERNMENT'S EXHIBITS 47 and 52 are the petition, with notice of motion, of the receiver, and the order made thereon, dated February 1, 1919, with notice of settlement thereof, granting the prayer of the petition by giving the receiver a period of six months from January 15, 1919, within which to arrive at a determination as to what con-
2669 tracts of the defendants in said suit, of which he had been appointed receiver, he should affirm or disaffirm, and within which time to make his election in that respect. GOVERNMENT'S EXHIBITS 104 and 105 are the petition of the receiver, with notice of motion, for and the order thereon, dated June 27, 1919, extending such time to December 31, 1919.

9. GOVERNMENT'S EXHIBITS 48 and 53, are the petition, with notice of motion, of the receiver, for instructions and authority, and the order made
2670 thereon, dated February 1, 1919, with notice of settlement thereof, authorizing and directing the receiver to pay interest maturing on February 1, 1919, on mortgage bonds, for which interest defendants were liable, and authorizing the receiver to borrow temporarily from time to time, on the credit of the receivership estate, such amount as he may need up to the amount of $3,000,000, on receiver's certificate, and to pledge any bonds, stock or other securities or other assets, available for such purpose, and referring the application of the receiver for the issuance of further receiver's certificates to the Special Master, to hear proof and

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letter, Government's Exhibit 2, or excerpts therefrom.

3. GOVERNMENT'S EXHIBIT 5 is a paper containing a list of names, including that of Charles L. Craig, Comptroller of New York City.

4. GOVERNMENT'S EXHIBITS 6, 7, 23, 29, 30, 32, and 33 consists of sheets of paper, the contents of which include copies of the letter, Government's Exhibit 2.

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5. GOVERNMENT'S EXHIBIT 31 is a letter, dated September 15, 1919, from Job Hedges to the members of the Board of Estimate and Apportionment, which, so far as material, referred to the enclosure of a copy of Government's Exhibit 26.

The following Exhibits, down to and including Government's Exhibit 108, are, unless otherwise indicated, of record in the suit begun by the Bill of Complaint, Government's Exhibit 34.

6. GOVERNMENT'S EXHIBIT 37 is the bond, dated December 31, 1918, of the temporary receiver appointed under the order, Government's Exhibit 36. GOVERNMENT'S EXHIBIT 39 is the report of the temporary receiver, dated January 14, 1919, setting forth his proceedings to that date under the order appointing him, Government's Exhibit 36.

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7. GOVERNMENT'S EXHIBITS 44 and 45 are the petition, with notice of motion, of the receiver for authority, and the order made thereon, dated January 27, 1919, authorizing and directing the receiver, at the expense of the receivership estate,

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arguments and make a report to the Court thereon with all convenient speed. GOVERNMENT'S EXHIBIT 67 is the report of the Special Master. GOVERNMENT'S EXHIBIT 88 is the petition of the receiver, with notice of motion, for authority to issue receiver's certificates in accordance with said report. GOVERNMENT'S EXHIBIT 91 is the affidavit of the Corporation Counsel of the City of New York upon the application. GOVERNMENT'S EXHIBIT 92 is the exceptions of the
2675 Central Union Trust Company to the report of the Special Master. GOVERNMENT'S EXHIBIT 93 is the decree dated May 29, 1919, authorizing and directing the receiver to issue receiver's certificates pursuant to said report. GOVERNMENT'S EXHIBIT 94 is the order, dated May 29, 1919, providing for the method of sale of the receiver's certificates. GOVERNMENT'S EXHIBIT 95 is the opinion of the District Judge setting forth the considerations, legal and otherwise, for the making of the decree, Government's Exhibit 93. GOVERNMENT'S EXHIBIT 108 is the opinion of the
2676 United States Circuit Court of Appeals, reported in 260 Fed., at page 550, on the appeal from the decree, Government's Exhibit 93.

10. GOVERNMENT'S EXHIBITS 49 and 64 are the petition, with notice of motion, of the receiver, dated January 22, 1919, for instructions of the Court with respect to bank loans, and the order thereon, dated March 10, 1919, directing the receiver not to pay any interest on or with respect to any bank loans.

11. GOVERNMENT'S EXHIBIT 50 is the order dated February 1, 1919, with notice of settlement

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thereof, appointing E. Henry Lacombe, Special Master, to take proof of the claims and demands against the defendants, and limiting the time for the presentation of claims to said Special Master to the 15th day of March, 1919. GOVERNMENT'S EXHIBIT 54 is the opinion of Hon. Julius M. Mayer, District Judge, dated February 3, 1919, providing for ascertainment, if the claimant prefer, of the liability and amount of damages in personal injury cases by jury trial, upon application therefor, instead of by liquidation before the 2678
Special Master. GOVERNMENT'S EXHIBIT 72 is the order, dated March 29, 1919, extending to May 1, 1919, the time limited under Government's Exhibit 50. GOVERNMENT'S EXHIBIT 82 is the order, dated April 29, 1919, extending the time of the City of New York and the Public Service Commission for the First District, to present claims and demands against the defendants New York Municipal Railway Corporation and the New York Consolidated Railroad Company until thirty days after the receiver shall have elected to affirm or disaffirm the contracts between the City 2679
of New York and said defendants, and reserving to the receiver the right to require the filing of the claims by the City within fifteen days after notice from the receiver so to do. GOVERNMENT'S EXHIBIT 83 is the order, dated May 1, 1919, extending to June 2, 1919, the time limited under Government's Exhibit 50. GOVERNMENT'S EXHIBIT 84 is the affidavit, verified May 1, 1919, of the publication of the notice requiring presentation to the receiver of claims and demands against the defendants on or before May 1, 1919. GOVERNMENT'S

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EXHIBIT 148 is the order, dated June 20, 1919, extending to July 15, 1919, the time limited under Government's Exhibit 50, and providing for publication of notice thereof. GOVERNMENT'S EXHIBIT 153 are the stenographer's minutes of the hearing resulting in said order.

12. GOVERNMENT'S EXHIBITS 55 and 56 the the petition No. 1 of the Central Union Trust Company for leave, and the order thereon, dated
2681 February 19, 1919, and entered February 20, 1919, granting said company leave to file in the United States District Court for the Southern District of New York a bill of complaint for the enforcement of its rights under the mortgages and deeds of trust of the defendants New York Municipal Railway Corporation and New York Consolidated Railroad Company, and for the collection of the debts represented by the bonds issued and outstanding under said mortgages and deeds. GOVERNMENT'S EXHIBIT 60 is the bill of complaint, with copy of mortgage annexed, filed March 1,
2682 1919, pursuant to said order, and praying for the foreclosure of the mortgages therein referred to. GOVERNMENT'S EXHIBIT 86 is the order, dated May 12, 1919, extending to June 19, 1919, the time of the defendants to plead in the suit. GOVERNMENT'S EXHIBIT 97 is the order, dated June 18, 1919, extending such time further to July 21, 1919. GOVERNMENT'S EXHIBITS 57 and 58 are the petition No. 2 of the Central Union Trust Company for leave, and the order thereon, dated February 19, 1919, and entered February 20, 1919, granting said company leave to file

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in the United States District Court for the Southern District of New York a bill of complaint for the enforcement of its rights under the mortgage and deed of trust of the defendant Brooklyn Rapid Transit Company, dated June 1, 1918, and for the collection of the debt represented by the bonds issued and outstanding under said mortgage and deed. GOVERNMENT'S EXHIBIT 61 is the bill of complaint, with copy of mortgage annexed, filed March 1, 1919, pursuant to said order and praying for the foreclosure of the mortgage therein referred to. GOVERNMENT'S EXHIBIT 85 is the order, dated May 12, 1919, extending, to June 19, 1919, the time of the Brooklyn Rapid Transit Company to plead in the suit.

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13. GOVERNMENT'S EXHIBITS 59 and 63 are the petition, with notice of motion, of the New York, Brooklyn & Manhattan Beach Railway Company for leave, and the order thereon dated February 28, 1919, granting the motion and permitting said company to sue the receiver for $10,181.67, and interest from August 8, 1916, by joining him as party defendant in action to be brought by the petitioner in the New York Supreme Court, Queens County, against the New York Municipal Railway Corporation for the purchase price of certain property therein described.

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14. GOVERNMENT'S EXHIBITS 65 and 66 are the petition of the receiver for, and the order made thereon, dated March 11, 1919, referring to E. Henry Lacombe, Esq., Special Master, the matter of the advisability of the payment by the receiver of the interest due on the first mortgage

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bonds of the Brooklyn Rapid Transit Company on April 1, 1919, to hear proofs and arguments and make a report to the Court of the facts and of his conclusions with respect thereto with all convenient speed. GOVERNMENT'S EXHIBIT 68 is the petition of the receiver for instructions with reference to some of the bonds which had been pledged. GOVERNMENT'S EXHIBIT 69 is the preliminary report of the Special Master, with reference to said bonds, recommending that the in-

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terest be not paid. GOVERNMENT'S EXHIBIT 70 is the petition, with notice of motion, of the receiver for the approval and confirmation of said report. GOVERNMENT'S EXHIBIT 71 is the order dated March 29, 1919, approving and confirming said preliminary report and directing continuance of hearings before the Special Master and the further hearing before the Court on May 5, 1919, and instructing the receiver, pending the final report of the Special Master, not to pay the interest. GOVERNMENT'S EXHIBIT 89 is the petition of the receiver for the reference to the Special

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Master of the advisability of the payment by the receiver of the interest due July 1, 1919, on the first refunding bonds of the Brooklyn Rapid Transit Company. GOVERNMENT'S EXHIBIT 90, is the order, dated May 22, 1919, referring said petition to the Special Master as prayed for therein. GOVERNMENT'S EXHIBIT 99 is the report of the Special Master, dated June 26, 1919, under the orders, Government's Exhibits 71 and 90. GOVERNMENT'S EXHIBIT 102 is the petition of the receiver, with notice of motion, for confirmation of said report. GOVERNMENT'S EXHIBIT 96 is the petition of the Equitable Trust Company,

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dated June 3, 1919, with notice of motion, praying that the matter of the surrender of the first refunding mortgage bonds of the Brooklyn Rapid Transit Company and the retirement thereby of certain certificates of indebtedness be referred to the Special Master, which was granted by order dated June 10, 1919. GOVERNMENT'S EXHIBIT 98 is the affidavit of the Corporation Counsel of the City of New York, verified June 11, 1919, in which he appeared specially for the City of New York and reserved the right, on behalf of the City, 2690
thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court, on behalf of the City and the travelling public of the City, with reference to the disposition of the foregoing petition, Government's Exhibit 102. GOVERNMENT'S EXHIBIT 103 is the order made thereon, dated June 27, 1919, directing the receiver not to pay the interest falling due on July 1, 1919, on said bonds. GOVERNMENT'S EXHIBITS 106 and 107 are the petition of the receiver, with notice of motion, for and the order thereon, dated July 2691
27, 1919, confirming the report of the Special Master with reference to the interest which became due April 1, 1919, on the mortgage bonds of the Brooklyn Rapid Transit Company, secured by its mortgage to the Equitable Trust Company, dated October 1, 1895, and directing the receiver not to pay the same.

15. GOVERNMENT'S EXHIBITS 73 and 74 are the petition of the receiver for an order ratifying and approving the receiver's action in employing his attorney and solicitor, and the order

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thereon, dated April 4, 1919, authorizing the receiver, at the expense of the receivership estate, to retain Carl M. Owen, Esq., as solicitor and attorney, and approving the acts of the receiver in theretofore retaining him as such.

16. GOVERNMENT'S EXHIBIT 75 is the opinion of Hon. Julius M. Mayer, District Judge, dated April 7, 1919, approving the report of the Special Master theretofore filed in reference to the
2693 award made by the War Department as compensation for certain dock property, belonging to the defendant New York Consolidated Railroad Company and taken by the United States for the purposes of said Department.

17. GOVERNMENT'S EXHIBITS 76 and 77 are the petition of the receiver for instructions, and the order made thereon, dated April 8, 1919, ratifying and approving the action of the receiver in taking charge of the work at East New York, theretofore carried on by the Crenshaw Engineer-
2694 ing & Construction Co., Inc., and authorizing the receiver to complete the work at the expense of the receivership estate, reserving all rights against said Engineering and Construction Company.

18. GOVERNMENT'S EXHIBITS 78 and 80 are the petition, with notice of motion, of the Central Union Trust Company for consolidation of causes, and the order made thereon, dated April 21, 1919, consolidating the suits begun respectively by the Bills of Complaint, Government's Exhibits 34 and 61. GOVERNMENT'S EXHIBIT 79 is an order, dated April 21, 1919, consolidating the suits

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begun respectfully by the Bills of Complaint, Government's Exhibits 34 and 60.

19. GOVERNMENT'S EXHIBIT 81 is the order, dated April 28, 1919, with notice of entry thereof on said day, granting leave to the Equitable Trust Company of New York to intervene in the United States District Court for the Southern District of New York, *pro interesse suo* solely to intervene against the execution of the order of the Court in the matter of Award of War Department for Dock Property.

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20. GOVERNMENT'S EXHIBIT 87 is the petition, with notice of motion, of the receiver for authority and direction to affirm the contract entered into between the New York Municipal Railway Corporation and the City of New York, dated March 19, 1913, known as Contract No. 4 (as modified by contract dated October 5, 1916) and two certificates for additional tracks and extensions, dated March 19, 1913, which was granted by order dated August 12, 1919.

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21. GOVERNMENT'S EXHIBITS 100 and 101 are the petition of the receiver for instructions, with notice of motion, and the order made thereon, dated June 27, 1919, authorizing the receiver, at the expense of the receivership estate, to take such action and make such expenditures as are necessary to preserve the corporate existence of the defendant companies.

The following exhibits, down to and including Government's Exhibit 209, are, unless otherwise

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indicated, of record in the suit begun by the Bill of Complaint, Government's Exhibit 109.

22. GOVERNMENT'S EXHIBIT 112 is the bond, dated March 20, 1919, of the receiver appointed under the order, Government's Exhibit 111, which was approved on its date.

23. GOVERNMENT'S EXHIBIT 115 is the petition of the National Surety Company, verified
2699 March 31, 1919, with notice of motion thereon, for the insertion of certain provisions in the order to be made appointing a permanent receiver. GOVERNMENT'S EXHIBIT 116 is the order, dated March 31, 1919, appointing Job Hedges permanent receiver, in form substantially the same as Government's Exhibit 43. GOVERNMENT'S EXHIBIT 117 is the consent and agreement of the surety on the bond of the temporary receiver, under the order dated March 20, 1919, that the bond should stand to secure the faithful discharge by the permanent receiver of the duties of his trust as such, under
2700 order, Government's Exhibit 116, dated March 31, 1919, duly approved April 10, 1919, by Hon. Julius M. Mayer, United States District Judge.

24. GOVERNMENT'S EXHIBITS 118 and 119 are the petition for and the order made thereon, dated April 2, 1919, appointing Messrs. Winthrop & Stimson, as solicitors and counsel for the receiver.

25. GOVERNMENT'S EXHIBIT 120 is the stenographer's minutes of the hearing before Hon. Julius M. Mayer, United States District Judge, on the applications resulting in the approval of Gov-

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ernment's Exhibit 117 and the making of the orders, Government's Exhibits 121 and 122.

26. GOVERNMENT'S EXHIBIT 121 is the petition of the receiver and notice of motion for, and the order thereon, dated April 10, 1919, authorizing and directing the receiver, at the expense of the receivership estate, to have the record in the suit printed.

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27. GOVERNMENT'S EXHIBIT 122 is the notice of motion for and order, dated April 10, 1919, directing notice by publication for claims and demands against the defendant, New York Railways Company, and directing that all claims and demands against said defendant should be presented to the receiver on or before the 16th day of June, 1919.

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28. GOVERNMENT'S EXHIBIT 123 is the petition of the Eighth Avenue Railroad Company, verified April 11, 1919 (with order to show cause thereon), to be permitted to intervene as a party defendant in the cause and for instructions and directions to the receiver to immediately pay and discharge rents due said company, and all liens upon the property of said company under lease, or for the return of the properties of said company by the receiver, together with order directing the receiver and parties herein to show cause on April 21, 1919, why the relief prayed for in the petition should not be granted. GOVERNMENT'S EXHIBIT 124 is the answer of the receiver, verified April 21, 1919, to said petition. GOVERNMENT'S EXHIBIT 125 is the affidavit of the Corporation

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Counsel of the City of New York, verified April 21, 1919, in which he appeared specially for the City of New York and reserved the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court on behalf of the City and the travelling public of the City with reference to the disposition of the foregoing petition. GOVERNMENT'S EXHIBIT 126 is the petition of the Ninth Avenue Railroad
2705 Company, verified April 11, 1919 (with order to show cause thereon), to be permitted to intervene as a party defendant in the cause, and for instructions and directions to the receiver to immediately pay and discharge rents due said company, and all liens upon the property of said company under lease, for the return of the properties of said company by the receiver, together with order directing the receiver and parties herein to show cause on April 21, 1919, why the relief prayed for in the petition should not be granted. GOVERNMENT'S EXHIBIT 127 is the answer of the receiver, veri-
2706 fied April 21, 1919, to said petition. GOVERNMENT'S EXHIBIT 128 is the affidavit of the Corporation Counsel of the City of New York, verified April 21, 1919, in which he appeared specially for the City of New York and reserved the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court on behalf of the City and the travelling public of the City with reference to the disposition of the foregoing petition. GOVERNMENT'S EXHIBIT 129 is the stenographic minutes of the hearing upon said petition, setting forth the argu-

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ments of counsel and the conclusion of the Court resulting in the orders, Government's Exhibits 130 and 131. GOVERNMENT'S EXHIBIT 130 is the order, dated April 30, 1919, denying said petition of the Eighth Avenue Railroad Company. GOVERNMENT'S EXHIBIT 131 is the order, dated April 30, 1919, denying said petition of the Ninth Avenue Railroad Company.

29. GOVERNMENT'S EXHIBIT 132 is the stenographer's minutes of the hearing, April 21, 1919, on the application for the appointment of a Special Master. GOVERNMENT'S EXHIBIT 133 is the order thereon, dated April 21, 1919, after such hearing appointing Francis M. Scott, Esq., Special Master in this cause, with the usual powers exercised under the rules of this Court by Special Masters in like cases, and directing the Special Master to take proof of the amount of all claims and demands against the defendant which might be presented to the receiver herein pursuant to the order, Government's Exhibit 122; except claims thereafter ordered by the Court to be otherwise proved and except claims for personal injuries or injuries to property sustained in the operation of the road and to report the same to the Court with his conclusions as to each of said claims and demands with all convenient speed.

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30. GOVERNMENT'S EXHIBIT 134 is the petition of the receiver for leave to employ engineers and accountants to make an examination of the property and finances of the defendant. GOVERNMENT'S EXHIBIT 135 is the order thereon, dated April 28, 1919, authorizing the employment

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of engineers and accountants for that purpose. GOVERNMENT'S EXHIBIT 136 is the stenographer's minutes of the hearing upon which said last mentioned order was made.

31. GOVERNMENT'S EXHIBIT 137 is the stenographer's minutes on the hearing, May 15, 1919, in which the Court heard counsel for the receiver and others in the applications of the receiver to be permitted to enter into contracts for
2711 paving and to purchase steel rails and for instructions with reference to the filing of the receiver's accounts, and in which the Court granted the motions of the receiver for authority to execute the paving contracts and to purchase the steel rails, and approved the proposed order requiring the filing of the receiver's accounts with the Special Master.

32. GOVERNMENT'S EXHIBIT 138 is the petition of the receiver for the instructions of the Court in reference to the Broadway and Seventh
2712 Avenue Railroad Company lease. GOVERNMENT'S EXHIBIT 139 is the order made thereon, dated May 29, 1919, directing the receiver to pay out of the funds in his possession as receiver, interest, taxes and other amounts set forth in said petition. Said order further contained a clause reading as follows:

> "(d) Any such payment so made by the Receiver shall be deemed to be made for account of whom it may concern, and shall in no way affect the right of the Receiver to affirm or disaffirm the lease made to the Houston,

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West Street and Pavonia Ferry Railroad Company by the Broadway and Seventh Avenue Railroad Company, dated the 13th day of May, 1890, the Court further reserving all equities as between the respective parties."

33. GOVERNMENT'S EXHIBIT 140 is the affidavit, verified May 29, 1919, of the Corporation Counsel of the City of New York, appearing specially and reserving the right on behalf of the City to question the jurisdiction of the Court over the parties and the subject matter of the suit and for the special purpose of suggesting to the Court the insertion of the words quoted above from Government's Exhibit 139, in any order made by the Court upon the petition, Government's Exhibit 138.

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34. GOVERNMENT'S EXHIBIT 141 is the stenographer's minutes of the hearing, June 10, 1919, setting forth the proceedings on the applications of the receiver for instructions with reference to (1) the contracts for transfers from the municipal ferry which was adjourned to June 12, 1919 (see Government's Exhibit 145); (2) filing the receiver's accounts, in which the Court announced the signing of the order as of June 10, on the motion heard May 15, relative to the filing of the receiver's accounts; and (3) payment of interest and rental of the 23rd Street Railway Company, in which the Court granted the motion of the receiver for authority to pay the same.

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35. GOVERNMENT'S EXHIBIT 142 is the petition of the Farmers Loan & Trust Company for leave to foreclose adjustment mortgage, dated Jan-

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uary 1, 1912, made by the defendant to said Farmers Loan & Trust Company, as Trustee, and GOVERNMENT'S EXHIBIT 143 is the order dated June 6, 1919, granting leave to said Company to file in the United States District Court for the Southern District of New York the bill of complaint for such foreclosure, with the defendant and the receiver among the parties defendant thereto. GOVERNMENT'S EXHIBIT 144 is the Bill of Complaint filed June 6, 1919, pursuant to the
2717 order, Government's Exhibit 143, for the foreclosure of the mortgage therein referred to, with a copy of the mortgage annexed to the bill as Exhibit A, and in form substantially the same as Government's Exhibit 60. GOVERNMENT'S EXHIBIT 158 is the consent of Job Hedges, Esq., to his appointment as receiver of the property of the defendant covered by and described in the mortgage for the foreclosure of which suit was begun by Bill of Complaint, Government's Exhibit 144. GOVERNMENT'S EXHIBIT 159 is the formal consent of the receiver's surety to the extension
2718 of his bond to secure the discharge of the receiver's duties in said foreclosure suit, as if originally made and filed in said cause.

36. GOVERNMENT'S EXHIBIT 145 is the stenographer's minutes on the hearing June 12, 1919, on the application of the receiver for instructions with respect to the municipal ferry transfers, resulting in instructions to the receiver "to take up negotiations with a view of seeing whether with due respect to the interests of the property, some transfer arrangement could be made which would accommodate the Staten Island situation without a depreciation of the property."

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37. GOVERNMENT'S EXHIBIT 146 is the second petition of the Eighth Avenue Railroad Company for the return to it of the property held by the defendant under lease. GOVERNMENT'S EXHIBIT 150 is the answer of the receiver to said petition. GOVERNMENT'S EXHIBITS 161 (see also below) and 163 are the stenographer's minutes of the hearings, resulting in the order, GOVERNMENT'S EXHIBIT 164, which is the order thereon, dated June 15, 1919, directing the receiver to return the property of the Eighth Avenue Railroad 2720
Company to it and to cease operation of the lines and property of said Company leased to the defendant. GOVERNMENT'S EXHIBIT 172 is the plan submitted to the Court by the railroad company, indicating the service to be rendered by said Company upon the return of its property by the receiver, upon which, among other things, the order, Government's Exhibit 164, was made. GOVERNMENT'S EXHIBIT 169 is the agreement, dated July 15, 1919, between the receiver and the Eighth Avenue Railroad Company, providing for the leasing by said company to the receiver of certain 2721
realty and equipment, for the supply of electric power, and for trackage rights, for the benefit of railroads still operated by the receiver, and for the interchange of passengers at certain points upon transfers.

38. GOVERNMENT'S EXHIBIT 147 is the second petition of the Ninth Avenue Railroad Company for the return to it of the property held by the defendant under lease. GOVERNMENT'S EXHIBIT 151 is the answer of the receiver to said petition. GOVERNMENT'S EXHIBITS 157

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and 161 (see also above) are the stenographer's minutes of the hearing on said petition. GOVERNMENT'S EXHIBIT 173 is the plan submitted to the Court by the railroad company, indicating the service to be rendered by said Company upon the return of its property by the receiver, upon which, among other things, the order, Government's Exhibit 204, was made. GOVERNMENT'S EXHIBITS 188 and 189 are the affidavit of the receiver, verified September 4, 1919, and notice of

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presentation thereof to the Court on September 9, 1919, relating to the operation of the Ninth Avenue Railroad by the receiver, upon which, among other things, the order, Government's Exhibit 204, was made. GOVERNMENT'S EXHIBIT 201 (see also below) is the stenographer's minutes of the hearings upon which the orders, Government's Exhibits 204, 205, 206 and 207, were made. GOVERNMENT'S EXHIBIT 204 is the order, dated September 26, 1919, directing the receiver to cease operation of the railroad lines of the Ninth Avenue Railroad Company and to re-

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turn to said company the property leased by it to the New York Railways Company. GOVERNMENT'S EXHIBITS 205, 206 and 207, are the order, dated September 30, 1919, together with the schedules 1 and 2 thereto annexed, approving the agreement, dated September 27, 1919, entered into between the receiver and the Ninth Avenue Railroad Company, setting forth the specific property to be returned and the cars to be supplied by the receiver to the Company and the manner and circumstances of the return. GOVERNMENT'S EXHIBIT 203 is the affidavit of the receiver's Auditor, giving certain data concerning the property

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affected by Government's Exhibits 205, 206 and 207. GOVERNMENT'S EXHIBIT 202 is the stenographer's minutes of the hearing, October 1, 1919, at which the Court directed that the questions arising upon Government's Exhibit 203 might be brought on at any time after November 1, 1919, after a month's operation under the agreement dated September 27, 1919, approved by Government's Exhibit 205.

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39. GOVERNMENT'S EXHIBIT 149 is the petition of the receiver, verified June 18, 1919, for instructions as to the operation of cars over the Williamsburgh Bridge. GOVERNMENT'S EXHIBIT 160 is the affidavit of the Corporation Counsel of the City of New York, verified June 25, 1919, in which he appeared specially for the City of New York and reserved the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of this suit, and presented suggestions to the Court on behalf of the City and the travelling public of the City with reference to the disposition of the foregoing petition. GOVERNMENT'S EXHIBITS 198 and 199 are affidavits of John Bauer, verified September 11, 1919, and Frederick T. Wood, verified September 19, 1919, setting forth certain data with reference to the operation of cars over the Williamsburgh Bridge. GOVERNMENT'S EXHIBIT 197 is the stenographer's minutes of the hearing, before the District Judge, September 22, 1919, at which the Judge took under advisement the question of whether he would send the matter to the Master or having a hearing in Court before himself in regard to the essential features of the matter.

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2728 *Statement of Contents of Certain Government's Exhibits.*

40. GOVERNMENT'S EXHIBIT 152 is the petition of the Farmers Loan & Trust Company, as Trustee, for consolidation of the suit begun by Bill of Complaint, Government's Exhibit 144, with the suit begun by the Bill of Complaint, Government's Exhibit 109. GOVERNMENT'S EXHIBIT 154 is the stenographer's minutes of the hearing on said petition. GOVERNMENT'S EXHIBIT 155 is the order made thereon, dated July 1, 1919, consolidating the two suits and extending the receivership to
2729 the foreclosure suit. GOVERNMENT'S EXHIBIT 156 is the stenographer's minutes of the hearing resulting in said order.

41. GOVERNMENT'S EXHIBIT 162 is the stenographer's minutes of the hearing, July 14, 1919, resulting in the decision of the Court authorizing the payment of interest, to and including October 2, 1919, on the note of the Guaranty Trust Company for $400,000, on the understanding that the Trust Company will extend the time of payment of the note to October 7th, 1919.

2730 42. GOVERNMENT'S EXHIBIT 168 is the petition of the Guaranty Trust Company for leave to file its Bill of Complaint for the foreclosure of the First Real Estate and Refunding Mortgage made by defendant. GOVERNMENT'S EXHIBIT 167 is the order thereon, dated July 11, 1919, granting such leave. GOVERNMENT'S EXHIBIT 166, is the petition for and GOVERNMENT'S EXHIBIT 165 is the order dated July 14, 1919, extending the receivership herein to the property and assets of the defendant, covered and described in said mortgage. GOVERNMENT'S EXHIBIT

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171 is said mortgage made by the defendant to Guaranty Trust Company of New York, dated January 1, 1912, securing its First Real Estate and Refunding Mortgage 4% Gold Bonds, aggregating in amount $18,024,000, face value of bonds, and $36,655.26 face value of the scrip, which is convertible when presented in amounts of $1,000 into equivalent amounts of bonds. GOVERNMENT'S EXHIBIT 170 is the Bill of Complaint verified July 11, 1919, for the foreclosure of said mortgage (in form substantially the same as Government's 2732
Exhibit 60). GOVERNMENT'S EXHIBIT 178 is the Answer of the defendant Railways Company to said Bill of Complaint admitting substantially all the allegations of the Bill, except that the Trust Company had been requested to declare the mortgage due and to foreclose the same; and praying that proof thereof be required. GOVERNMENT'S EXHIBIT 179 is the answer of the receiver to said Bill, denying certain allegations of the Bill and praying that proof there be required. GOVERNMENT'S EXHIBIT 184 is the petition for the consolidation of the suit begun by said Bill 2733
of Complaint with this cause. GOVERNMENT'S EXHIBIT 185 is the order, dated September 11, 1919, consolidating the causes as prayed for in said petition. GOVERNMENT'S EXHIBIT 193 is the stenographer's minutes of the hearing, September 11, 1919, upon which said order was made.

43. GOVERNMENT'S EXHIBITS 174, 175, 176 and 177 are the report of the receiver, dated July 31, 1919, with schedules thereto annexed, as to his application to the Public Service Commission of the State of New York for the First District, to be

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relieved of statutory requirements and orders of the Commission, in reference to the issuance and acceptance of transfers, and of the action taken thereon by the said Commission, which authorized the receiver to charge, in addition to the regular fare, two cents for each transfer demanded by a passenger desiring to make one continuous trip, or take one continuous ride between points on lines owned, operated or controlled by the defendant or its receiver and points on other roads, at and only

2735 at such points as the Commission was empowered by law to authorize them to charge for transfers.

44. GOVERNMENT'S EXHIBIT 181, is the petition of the Central Union Trust Company of New York for and GOVERNMENT'S EXHIBIT 180 is the order thereon, dated September 11, 1919, granting said Trust Company leave to make the receiver a party to the Bill of Complaint to be filed by it for the foreclosure of the mortgage, dated April 1, 1889, and executed by the South Ferry Railroad Company to said Trust Company.

2736 GOVERNMENT'S EXHIBIT 194 is the stenographer's minutes of the hearing upon which the Court made said order. GOVERNMENT'S EXHIBITS 182 and 183 are the Bill of Complaint filed September 11, 1919 (in form substantially the same as Government's Exhibit 60) for the foreclosure of said mortgage, and Exhibit A annexed thereto, viz., a copy of said mortgage.

45. GOVERNMENT'S EXHIBIT 186 is the petition of the receiver for instructions with reference to the continuance of operation of the car lines in the City of New York operated by storage batteries.

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GOVERNMENT'S EXHIBIT 187 is the order, dated September 12, 1919, authorizing and directing the receiver to discontinue the operation of such lines. GOVERNMENT'S EXHIBIT 192 is the affidavit of the receiver's Auditor, verified September 12, 1919, presenting certain data to the Court, upon which in part, it based said order. GOVERNMENT'S EXHIBIT 195 is the stenographer's minutes of the hearing upon which the Court made said order.

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46. GOVERNMENT'S EXHIBIT 191 is the petition of the receiver for instructions as to the discontinuance of the arrangements for transfers with the Eighth Avenue Railroad Company. GOVERNMENT'S EXHIBIT 190 is the order made thereon, dated September 10, 1919, directing the Eighth Avenue Railroad Company, and parties in the cause to show cause why the relief prayed for in the petition should not be granted and providing for the method of service of said order to show cause. GOVERNMENT'S EXHIBITS 196, 200 and 201 (see also above) are the stenographer's minutes of the hearings on said petition, upon which the Court announced its decision to direct discontinuance of the interchange of transfers with the Eighth Avenue Railroad Company.

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47. GOVERNMENT'S EXHIBIT 208 is the order dated September 30, 1919, directing the receiver to pay the interest due October 1, 1919, on the mortgage dated April 1, 1896, made by the 34th Street Crosstown Railway Company, whose railroad was operated by the defendant New York Railways Company under an agreement guarantee-

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ing the payment of such interest. GOVERNMENT'S EXHIBIT 209 is the petition of the receiver for instructions upon which said order was made.

The following Exhibits, down to and including Government's Exhibit 225, except Government's Exhibit 224, are, unless otherwise indicated, of record in the bankruptcy proceeding begun by the Petition, Government's Exhibit 210.

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48. GOVERNMENT'S EXHIBIT 210 is the Creditors' Petition, dated March 21, 1919, in the bankruptcy proceeding instituted against Interborough Consolidated Corporation, upon which the adjudication, Government's Exhibit 213, was made. GOVERNMENT'S EXHIBIT 211 is the application of the petitioning creditors for the appointment of a receiver pending adjudication in bankruptcy. GOVERNMENT'S EXHIBIT 212 is the order, dated March 31, 1919, made thereon, appointing James R. Sheffield, Esq., Temporary Receiver in Bankruptcy of the property, assets and effects of Interborough Consolidated Corporation. GOVERNMENT'S EXHIBIT 213 is the adjudication in bankruptcy of Interborough Consolidated Corporation, made on the petition, Government's Exhibit 210, and the order of reference to Macgrane Coxe, Esq., as Referee. GOVERNMENT'S EXHIBIT 214 is the certificate of election of James R. Sheffield, Esq., as Trustee of Interborough Consolidated Corporation, at creditors' meeting held on April 25, 1919, and approval by the referee of the Trustee's election. GOVERNMENT'S EX-

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HIBIT 215 are the Schedules in Bankruptcy filed by the Interborough Consolidated Corporation. GOVERNMENT'S EXHIBIT 216 is the order, dated April 26, 1919, by the Referee in Bankruptcy, approving the bond of the Trustee. GOVERNMENT'S EXHIBIT 217 is the order of the referee dated May 12, 1919, authorizing the Trustee to retain Messrs. Levintritt, Cook, Nathan & Lehman, as his attorneys and counsel. GOVERNMENT'S EXHIBIT 218 is the notice to creditors, dated May 21, 1919, of the presentation of the receiver's account. GOVERNMENT'S EXHIBIT 219 is the report of the referee, dated June 7, 1919, approving the receiver's account. GOVERNMENT'S EXHIBIT 220 is the order of the District Court, dated June 24, 1919, approving the referee's report. GOVERNMENT'S EXHIBIT 221 is the first report of the Trustee, dated July 30, 1919, of his acts and proceedings as Trustee to that date. GOVERNMENT'S EXHIBITS 222 and 223 are together the same as Government's Exhibit 26. GOVERNMENT'S EXHIBIT 224 is the circular letter, dated December 8, 1919, signed by the Trustee of Interborough Consolidated Corporation and the receivers of the New York Railways Company and Brooklyn Rapid Transit Company. GOVERNMENT'S EXHIBIT 225 is the order, dated October 2, 1919, of the Referee in Bankruptcy extending to December 1, 1919, the Trustee's time to file a second report.

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49. GOVERNMENT'S EXHIBIT 114 is an affidavit, verified March 31, 1919, of record in the suit begun by the Bill of Complaint, Government's Exhibit 109, made by the Corporation Counsel of the

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City of New York appearing specially and reserving the right on behalf of the City thereafter to question the jurisdiction of the Court over the parties and the subject matter of the suit and for the special purpose of suggesting to the Court facts on behalf of the City with reference to its interest in the operation of the transit lines in the City of New York, upon which the order appointing permanent receiver in said suit, Government's Exhibit 111, was made.

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Government's Exhibit No. 26—(198) 2749
Opinion of Mayer, J., in re Report of Stone & Webster.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,
Plaintiff,
against
BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY,
Defendants.

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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
NEW YORK RAILWAYS COMPANY,
Defendant.

In the Matter
of the
INTERBOROUGH CONSOLIDATED CORPORATION,
Bankrupt,
CENTRAL UNION TRUST COMPANY OF NEW YORK,
Plaintiff,
against
BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION, NEW YORK CONSOLIDATED RAILROAD COMPANY and LINDLEY M. GARRISON, as Receiver, etc., et al.,
Defendants.

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MAYER, District Judge:

Messrs. Stone & Webster, acknowledged experts of high standing, were employed some months ago by direction of the Court, to undertake, among other things, an investigation of the financial con-

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dition of the properties affected by the receiverships pending in this Court. This independent expert inquiry is now nearing completion and the Court is awaiting the final report of Messrs. Stone & Webster, in respect of essential features of the transportation problems, including questions relating not only to financial conditions, but also to operation, property valuations and other important subjects.

Since this inquiry was begun, the financial difficulties of the roads have grown greater instead of
2753 less. The recent increase in wage cost made necessary the request by the Court for immediate information, to which Messrs. Stone & Webster have answered, as appears by their letter, a copy of which is annexed.

This report, especially the statement that the surface lines in the charge of the Court's Receivers are failing by about $200,000 a month to earn their actual operating expenses, indicates a grave and immediate crisis. It is impossible to forecast the serious results which lack of financial aid may bring about, affecting most vitally the welfare of the peo-
2754 ple of the City of New York. Manifestly lines cannot long be operated at an actual loss. The problems involved press for calm and serious consideration and an earnest and united effort toward prompt solution. That some means must be devised for at least temporary relief seems plain and urgent.

That plans should be worked out for determining the permanent status of the transportation companies and their legal and financial relations to the State and Municipal Governments, seems an obvious duty, the performance of which should be promptly undertaken.

The legal, financial and governmental questions involved are numerous and intricate and, natur-

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ally, there are differing views as to the wise and proper policies to be adopted.

Because the problems presented are so grave and the emergency is so pressing, and disaster so imminent, every good citizen must feel that the effort to solve these problems should be undertaken promptly and as nearly free from controversy, political or otherwise, as possible.

In order that the gravity of the situation may be generally made known and that some appropriate action may be taken as speedily as is consistent with full information, the Receivers are instructed 2756
to send a copy of the summary of Messrs. Stone & Webster and of this memorandum to the State and Municipal authorities, and to civic and taxpayers' associations of the Greater City. At the same time, the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations to satisfy themselves in respect of the actual financial and other conditions existing in relation to the corporations now in their official charge.

Meanwhile, it is earnestly hoped that all who have official duties to perform, whether by State, 2757
Municipal or Legislative action, will reserve their judgment and conclusions on the fundamental questions involved, until they shall have had adequate opportunity to satisfy themselves of the facts and of the real conditions existing. Such a course will enable all concerned to arrive at a just determination, based (as all just determinations must be), on an accurate knowledge of the facts.

JULIUS M. MAYER,
District Judge.

September 6, 1919.

2758

STONE & WEBSTER

120 Broadway, New York

September 4, 1919.

Honorable Julius M. Mayer,
United States District Judge,
New York City.

Dear Sir:

2759 In compliance with your request for information regarding the effect which the recent increase in wages will have upon the financial position of the properties in charge of your Receivers, we give you below, our estimate of the operating results of the various properties for the twelve months beginnning September 1, 1919.

We may add that the various operating officials are in substantial accord with our conclusions:

Surface Lines in Manhattan (New York Railways Company) in Charge of Receiver Hedges:

2760 For the twelve months the aggregate operating deficit of these lines will be about $1,113,000

Surface Lines of Brooklyn in Charge of Receiver Garrison:

For the twelve months the aggregating operating deficit of these lines will be about 1,268,000

Total Operating Deficit of the Surface Lines of the two Boroughs for the twelve months 2,381,000

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This means that the income of these surface lines will fail by about $200,000 per month to provide actual operating expenses and taxes *without any provision for bond interest, rentals and other fixed charges,* and will fail by about $853,000 per month to earn these fixed charges.

Upon the basis of the present cost of materials, and supplies, rates of wages and fares, there is no prospect that these surface lines will earn their operating expenses and taxes for years to come, if ever.

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Subway and Elevated Lines in Manhattan Operated by Interborough Rapid Transit Company, whose Stock is in the hands of James R. Sheffield, Trustee in Bankruptcy, of the Interborough Consolidated Corporation.

These lines, which in the fiscal year 1917, earned a surplus of $8,885,358.52 above all fixed charges, will for the next twelve months fail to earn fixed charges including the interest on the Company's $200,092,000 of outstanding bonds and notes (most of which were issued to provide for the Company's share of the cost of the Subways) by about $9,880,000

2763

Elevated and Subway Lines in Brooklyn (Brooklyn Rapid Transit Company) in Charge of Receiver Garrison:

These lines, which in the fiscal year 1917, earned a surplus of $1,523,457 above all fixed charges, will for the next twelve months (after the payment of interest upon the recently issued Receiver's Cer-

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tificates and upon the underlying mortgages) fail to earn the interest on the Company's $60,000,000 of outstanding bonds and notes issued to provide in part for the Company's investment in the new Subways by about $2,798,000

Upon the present basis of prices for materials and supplies, rates of wages and fares, there is no hope that the Elevated and Subway Lines of either Borough will earn interest upon the Companies' investment in the Subways for many years to come, if ever.

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Yours very truly,

(Signed) STONE & WEBSTER.

2766

Government's Exhibit No. 34—Bill of Complaint. 2767

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E15—347.

2768

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK: 2769

The plaintiff, Westinghouse Electric and Manufacturing Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, and a citizen of said state, brings this its bill of complaint on its own behalf and on behalf of all creditors of the defendants herein who may hereafter join in the prosecution of this suit, against the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation

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and New York Consolidated Railroad Company, corporations organized and existing under and by virtue of the laws of the State of New York and citizens of said state, and thereupon plaintiff alleges as follows:

FIRST.—The plaintiff, Westinghouse Electric and Manufacturing Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania and a citizen and resident of said state.

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SECOND.—On information and belief that the defendants Brooklyn Rapid Transit Company (hereinafter termed the Transit Company), New York Municipal Railway Corporation (hereinafter termed the Subway Company), and New York Consolidated Railroad Company (hereinafter termed the Consolidated Company), and each of said defendants at all the times hereinafter mentioned were and are now corporations duly organized and existing under and by virtue of the laws of the State of New York and citizens and resi-

2772 dents of said state.

THIRD.—The ground upon which the jurisdiction of the court depends in this suit is the diversity of citizenship of the plaintiff and of the defendants and the amount in controversy herein is in excess of the sum of $5,000, exclusive of interest, costs and expenses. This suit is brought for the purpose of enforcing the claims of the plaintiff against the Transit Company and against the Subway Company, for the appointment of a receiver or receivers of said Companies and of the Consolidated Company; the determination of the claims

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of the creditors of said three Companies; the marshalling of the assets of said Companies and the sale and distribution of said assets among their respective creditors; and for the other relief hereinafter set forth.

FOURTH.—The Transit Company is indebted to the plaintiff in the sum of $40,235.72 with interest thereon, for electrical equipment, materials and supplies heretofore sold and delivered by the plaintiff to the Transit Company at its request. Said sum is wholly unpaid and there are no offsets or counterclaims thereto.

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FIFTH.—The Subway Company is indebted to the plaintiff in the sum of $6,225.00, with interest thereon, for electrical equipment, materials and supplies heretofore sold and delivered by the plaintiff to the Subway Company at its request. Said sum is wholly unpaid and there are no offsets or counterclaims thereto.

SIXTH.—On information and belief that the Transit Company was organized under the laws of the State of New York on or about January 18, 1896, and has outstanding 745,200 shares of capital stock of the par value of $100 each.

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SEVENTH.—On information and belief that the Consolidated Company has outstanding 50,000 shares of preferred stock and 139,000 shares of common stock, of the par value of $100 each, of which 47,854.8539 shares of preferred stock and 131,800.3063 shares of common stock are owned by the Transit Company.

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EIGHTH.—On information and belief that the Subway Company has outstanding 2,000 shares of capital stock of the par value of $100 each, all of which are owned by the Consolidated Company, and that the Subway Company has also outstanding $60,000,000 face amount of First Mortgage Five Per Cent. Sinking Fund Gold Bonds (Series A) bearing the endorsement of the Consolidated Company guaranteeing and assuming and agreeing to pay the principal and interest of said bonds and the sinking fund provided for in the mortgage se-
2777 curing the same and bearing also the endorsement of the Transit Company assuming and agreeing to pay said principal, interest and sinking fund, $57,735,000 face amount of which said bonds of the Subway Company are owned by the Transit Company and pledged by it as part of the collateral security for the Notes of the Transit Company hereinafter mentioned.

NINTH.—On information and belief that the Transit Company is also the owner of stock of various other companies, including the following:

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Name of Company	Owned by Transit Company No. of shares of stock.
The Nassau Electric Railroad Company.	63,670.75
Coney Island & Gravesend Railway Company	3,500.00
South Brooklyn Railway Company	4,991.00
Bridge Operating Company	500.00
The Brooklyn Heights Railroad Company	1,987.00
Brooklyn, Queens County and Suburban Railroad Company	19,991.00

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and of various bonds and certificates or evidences of indebtedness of said respective companies, and also controls Coney Island & Brooklyn R. R. Co. through ownership of stock of said Company by Coney Island & Gravesend Ry. Co.

TENTH.—On information and belief, that the Subway Company, the Consolidated Company and the other companies hereinbefore referred to own or lease and operate various lines of street, surface, elevated and subway railways in the boroughs of Manhattan, Brooklyn and Queens in the City 2780
of New York, all of which are controlled by the Transit Company by reason of the stock ownership hereinbefore set forth.

ELEVENTH.—On information and belief, that the Transit Company also owns and leases and is engaged in the operation of power houses, power plants and sub-stations in the Boroughs of Manhattan and Brooklyn in the City of New York, for the generation and supply of electrical energy required for the operation of the aforesaid lines of street surface, elevated and subway railways, 2781
and generates and supplies the electrical energy necessary for the operation thereof, and the Transit Company also owns or leases and is engaged in the operation of shops, car-barns, real estate and other facilities necessary for the maintenance and repair of said lines of railway and of the equipment appurtenant thereto and is engaged in the maintenance, repair and upkeep of said lines of railway and equipment.

TWELFTH.—On information and belief, that the Subway Company was organized under the laws

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of the State of New York for the purpose of maintaining and operating railroads, including the equipment thereof, constructed pursuant to the provisions of Chapter 4 of the Laws of 1891, as amended, and has heretofore entered into a contract and lease (hereinafter termed the Subway Contract) with the City of New York to contribute toward the cost of construction of and to equip, operate and maintain rapid transit, railroads owned or to be owned by the City, and also so as to reconstruct and add to the railroads and property
2783 of the Consolidated Company as to adapt them for operation in connection with said City owned rapid transit railroads. On information and belief that contemporaneously with the execution of the Subway Contract the Public Service Commission for the First District of the State of New York issued to the Subway Company and the Subway Company accepted certain certificates for the construction, equipment, maintenance and operation of certain extensions and certain additional tracks, respectively, in conjunction with the railroads and properties of the Consolidated Company as in the Subway
2784 Contract and in said certificates more particularly specified and described.

THIRTEENTH.—On information and belief that for the purpose of providing funds for the construciton, equipment, operation and maintenance of said rapid transit railroads under the Subway Contract and for the purpose of enabling the Subway Company to carry out and perform said contract, the Subway Company duly authorized and created an issue of its First Mortgage Five Per Cent. Sinking Fund Gold Bonds of which $60,000,000 face amount were issued and sold to the Transit Company at

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97 per cent. of the face amount thereof and accrued interest, and the Subway Company received from the Transit Company the purchase price of said bonds; the amount so received by the Transit Company having been realized by the Transit Company from the sale of $60,000,000 face amount of its Six Year Five Per Cent. Secured Gold Notes due July 1, 1918, secured in part by the pledge of said First Mortgage Five Per Cent. Sinking Fund Gold Bonds of the Subway Company.

FOURTEENTH.—On information and belief that 2786
the Consolidated Company was duly organized under the laws of the State of New York as a consolidation of the Brooklyn Union Elevated Railroad Company, Sea Beach Railway Company and Canarsie Railroad Company and has outstanding $16,000,000 face amount of bonds of said Brooklyn Union Elevated Railroad Company; $7,000,000 face amount of bonds of Kings County Elevated Railroad Company (predecessor of said Brooklyn Union Elevated Railroad Company); and $650,000 face amount of bonds of said Sea Beach Railway Company; payment of the principal and interest 2787
of all of which said bonds has been assumed by the Consolidated Company.

FIFTEENTH.—On information and belief, that the Consolidated Company acquired and is still the owner of all the outstanding stock of the Subway Company; and that under date of January 31, 1913, a certain contract known as the Operating Contract was entered into by and between the Subway Company and the Consolidated Company, providing that the Subway Company should have the right and it thereby agreed during the term specified

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in the Operating Contract to maintain and operate the railroads and properties of the Consolidated Company as therein, and in the Subway Contract described, such maintenance and operation to be either, of said railroads and property separately or in accordance with and as provided in the Subway Contract. In and by the Operating Contract it was provided among other things as follows:

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The Subway Company shall be responsible for and shall pay and discharge any and all debts and obligations incurred by the Subway Company during its possession and operation of the Railroads and Properties and in that regard, including the expenses of operating the Railroads and Properties and conducting the business thereof, and the cost of all repairs, maintenance, renewals, replacements and alterations, as far as the same are fairly chargeable to operating expenses, and also the compensation for the services of its agents and employes. The Subway Company shall likewise, during such possession and operation, pay all interest earned during said interval and due upon the Underlying Bonds, although the same may be either extended or renewed, and upon any and all bonds issued by the Consolidated Company to pay, refund or take up any Underlying Bonds. The Subway Company shall not, in any event, be liable to pay or be responsible for the payment of the principal of said Underlying Bonds when they become due, whether they be extended or renewed, or of any bonds the Consolidated Company shall issue to refund or repay the same.

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The Subway Company, during such posses-

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sion and operation of the Railroads and Properties, shall pay and discharge all taxes and assessments and other governmental or municipal charges levied on the Railroads and Properties, as and when the same become due and payable, but with the right to contest by proper proceedings at law or in equity the validity or legality of the same or any part thereof. The Subway Company will not, during such period of possession and operation, permit or suffer any waste of the Railroads and Properties and will keep and maintain the same in 2792
the order and condition required in and by the Subway Contract.

The Subway Company will account for and pay over to the Consolidated Company, as compensation for the possession and operation of the Railroads and Properties during such possession and operation under this agreement, any and all surplus moneys (over and above an amount equivalent to six per cent. per annum on the par value of capital stock of the Subway Company issued and outstanding from time to time) remaining to the 2793
Subway Company after payment of interest charges earned on the Underlying Bonds, interest and sinking fund charges earned on bonds of the Subway Company, and after any and all other payments under the provisions of the Subway Contract and the Certificates and of this agreement, or either of such instruments, as well as any and all payments made by the Subway Company, with or without the consent of the Consolidated Company, to discharge the lawful debts or obligations of the Consolidated Company, and to protect and pre-

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serve unimpaired the rights and privileges conferred by this agreement. All payments to be made to the Consolidated Company under the provisions of this article shall be made, on or before the 30th day of January, April, July and October in each year.

SIXTEENTH.—On information and belief that thereafter and under date of March 25, 1913, a certain agreement of assignment and lease was entered into by and between the Subway Company
2795 and the Consolidated Company wherein and whereby it was provided among other things that unless and until said assignment and lease should be terminated as therein provided, the Operating Contract and each and every provision thereof should be suspended. On information and belief that in and by said assignment and lease the Subway Company assigned to the Consolidated Company the rights and obligations of the Subway Company under the Subway Contract with respect to the maintenance and operation of the rapid transit railroads owned and to be owned by the City of
2796 New York in conjunction with the railroads and properties of the Consolidated Company and the Subway Company leased to the Consolidated Company the franchises, railroads and properties acquired or to be acquired by the Subway Company under the certificates for the construction, equipment, operation and maintenance of additional tracks to and extensions of the railroads and properties of the Consolidated Company. On information and belief that in and by said assignment and lease the Subway Company reserved to itself the rights and obligations under the Subway Contract to contribute to the cost of construction of and to

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equip the rapid transit railroads owned or to be owned by the City and to reconstruct and add to the railroads and properties of the Consolidated Company so as to adapt them for operation in conjunction with said rapid transit railroads; and also reserved to itself the rights and obligations under said certificates for additional tracks and for extensions respectively to construct and equip the additional tracks to and extensions of the railroads and properties of the Consolidated Company. On information and belief that as required by the terms and provisions of said assignment and lease the 2798
Consolidated Company guaranteed the payment of the principal and interest of the bonds of the Subway Company hereinbefore referred to and also guaranteed the payment of the sinking fund provided for in the mortgage securing said bonds, and the Consolidated Company executed and delivered to the trustee under said mortgage of the Subway Company a mortgage and deed of trust covering all the railroads and properties of the Consolidated Company to secure said guaranties.

SEVENTEENTH.—On information and belief that 2799
the Subway Company duly proceeded with the construction and with the provision of equipment and with the expenditures called for, by the Subway Contract and by the certificates hereinbefore referred to and has now completed the greater part of said construction and equipment and has contributed toward the cost of construction of the City-owned rapid transit lines all or practically all of the amounts required by the Subway Contract.

On information and belief that at the time when the Subway Contract was entered into between the Subway Company and the City of New York it was

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estimated that the amount received by the Subway Company from the sale of its $60,000,000 face amount of First Mortgage Bonds as herein set forth, would be sufficient to enable the Subway Company to complete and provide the initial construction and equipment called for under the terms of the Subway Contract and of the certificates hereinbefore referred to; but that owing to delays beyond the control of the Subway Company and to the great increase in the cost of labor, materials, supplies and equipment since the date of the execu-
2801 tion of the Subway Contract, the cost of the work called for by said contract and said certificates has largely exceeded the estimates as to the amount of the cost thereof, and that it is now estimated that a further sum of at least $11,000,000 will be required for the completion of such construction and equipment; that the Subway Company has now expended substantially all of the proceeds derived by it from the sale of said $60,000,000 face amount of its First Mortgage Bonds, and is now without funds adequate or sufficient to enable it to complete the programme of construction and equipment
2802 required of it by the Subway Contract and by said certificates, and is also without funds sufficient for the payment of obligations and indebtedness incurred by the Subway Company in the course of such construction and equipment and now due or shortly to become due under contracts heretofore let [illegible] for construction and for the provision of equipment, the amount of such obligations and indebtedness of the Subway Company so now due or shortly to become due being in excess of $4,200,000.

EIGHTEENTH.—On information and belief, that the Transit Company has an outstanding funded indebtedness of $70,305,000.00 made up as follows:

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First Refunding Mortgage Convertible 100 Year Gold Mortgage Bonds due July 1, 2002, interest payable January 1 and July 1.....	$5,570,000
50 Year Gold First Mortgage 5% Bonds due October 1, 1945, interest payable April 1 and October 1.....	7,000,000
6 Year 5% Gold Notes due July 1, 1918, interest payable January 1 and July 1.....	580,000
3 Year 7% Gold Notes due July 1, 1921, interest payable January 1 and July 1.....	57,155,000
Total.....	$70,305,000

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and that the Transit Company has also an outstanding floating indebtedness of upwards of $4,850,000.00 for money borrowed from, and for materials and supplies furnished by, various persons, firms and corporations, all of which floating indebtedness is either now or will shortly be due and payable.

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NINETEENTH.—On information and belief that default was made by the Transit Company in the payment of the principal of its Six Year 5% Gold Notes due July 1, 1918, and that said default still continues; and that an installment of interest amounting to $2,000,425 will become due and payable on January 1, 1919, on the Three Year 7% Gold Notes of the Transit Company. On information and belief that the Transit Company is without means to pay said installment of interest due January 1, 1919, and that default will be made by the Transit Company on said date in the payment of the installment of interest then due on said notes.

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On information and belief that said Three Year 7% Gold Notes of the Transit Company are secured in part by the pledge with the trustee of the trust agreement securing said notes of $57,735,000 face amount of the First Mortgage Bonds of the Subway Company hereinbefore referred to, the interest and sinking fund upon the outstanding $60,000,000 face amount of bonds of said issue, amounting to upwards of $1,500,000, will become due and payable on January 1, 1919; that the Subway Company is without means to pay said installment of
2807 interest and sinking fund due January 1, 1919, and that default will be made by the Subway Company on said date in the payment of the installment of interest and sinking fund then due on said bonds.

On information and belief that the Consolidated Company as guarantor of the bonds of the Subway Company is also without means to pay the creditors and to the general public and the City of New York that the railroad system of the Consolidated Company and of the Subway Company should be continued to be operated as a whole, that said system should be preserved, and that the construction and
2808 equipment of said system should be wholly completed and placed in operation as one system as provided for in the Subway Contract and in the certificates hereinbefore referred to.

On information and belief that a large part of the system of rapid transit railroads required by the Subway Contract to be constructed by the City of New York and to be equipped by the Subway Company has already been constructed and equipped; that the railroads and properties of the Consolidated Company have in large part been reconstructed and added to as provided for in the Subway Contract; that the extensions of, and in

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large part the additional tracks to the railroads of the Consolidated Company have been constructed and equipped; that the rapid transit lines of the City, to the extent now constructed and equipped, have been placed in operation and are now being operated by the Consolidated Company in conjunction with the railroads and properties of the Consolidated Company as so reconstructed and added to, and in conjunction with the extensions and additional tracks as so constructed and equipped, all as part of one system of rapid transit railroads partially constructed, equipped and placed in operation; and that it is of vital importance to the defendants herein and their respective creditors and to the general public and the City of New York that the construction and equipment of said system of rapid transit railroads should be completed and that the same should be preserved intact and operated as one system and that the railroads and properties of the Consolidated Company should not be cut out of said system through the foreclosure of the underlying mortgages of the Consolidated Company or through proceedings on the part of other creditors of said Company.

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TWENTY-FIRST.—On information and belief that substantially all of the earnings and income of the Transit Company are and have been derived from the companies controlled by the Transit Company as above set forth; that during the last few years the cost of operation of the lines of street surface, elevated and subway railways operated by said controlled companies have largely increased by reason of the increase in the price of labor, materials, supplies and equipment, while the rates of fare which said controlled companies are by law permitted to

2812 charge have not been increased, with the result that the amount of the net earnings and income of the Transit Company and of the companies controlled by it has been decreased and their credit impaired; so that the defendants are now unable to meet their obligations as they mature, or to provide the funds necessary for proper additions, betterments and improvements to their respective properties required to enable the defendants properly to carry on the business of said companies and of the companies controlled by the Transit Com-
2813 pany through stock ownership, either through the borrowing of additional capital or from the earnings and income of their respective properties or otherwise.

TWENTY-SECOND.—On information and belief many of the creditors to whom the defendants are respectively liable are pressing said defendants for immediate payment and that some of said creditors may bring suits in respect of their said claims and may levy execution on the property owned by said defendants respectively and on the materials, sup-
2814 plies and other property of the defendants, respectively on hand and kept by them for the necessary construction, equipment, maintenance and operation of the lines of rapid transit railroad hereinbefore referred to and of the lines of railroad owned or leased and operated by the several companies controlled by the Transit Company through stock ownership; and that there is grave danger that the lines of said several companies can no longer be operated under a unified control, but that said various lines which are now controlled by the transit Company may be broken up and be separately operated; that there is likewise grave

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danger that suits may be instituted against the defendants in respect of the claims above stated; and that it is essential to the interest of the defendants and their respective creditors and of the public that the property and assets of the defendants should not be sacrificed.

On information and belief that the several companies controlled by the Transit Company as herein set forth are themselves without power-plants, sub-stations and facilities for the generation and supply of the electrical energy necessary for the operation of their respective properties; the same 2816
having heretofore been and now being furnished and supplied by the Transit Company and that unless the Transit Company is permitted through the appointment of a receiver or receivers to continue the operation of said power-plants, sub-stations and facilities, it will be impossible for it to continue the operation thereof or to continue the supply of electrical energy necessary for the continued operation of the lines of railroad of said controlled companies, and said several controlled companies will no longer be able to operate their said lines of railroad or to transport passengers 2817
over the same.

TWENTY-THIRD.—On information and belief that the only means whereby the defendants can meet their respective obligations and pay their respective floating indebtedness and discharge their respective current obligations is by the continued maintenance and operation of the lines of street surface, elevated and subway railways now owned or leased and operated by the Subway Company, the Consolidated Company and the several companies controlled by the Transit Company under one

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unified control as at present; that any suits upon or process against their respective properties and revenues would seriously embarrass and cripple them, and diminish, if not destroy, their power successfully to continue their respective business; that the lines of street surface, elevated and subway railways operated by the several companies controlled by the Transit Company are so numerous and extensive as to constitute a large part of the rapid transit railroad system in the City of New York and practically the entire street surface sys-
2819 tem in the County of Kings and a large part of the street surface railroads in the County of Queens; that during the calendar year 1918 said systems of street surface and rapid transit railroads carried about 771,000,000 passengers; and the average number of persons employed by the Transit Company and by its various controlled and allied corporations, including the Subway Company and the Consolidated Company, exceeds 12,000, and that it is of vital importance to the people of the City of New York that said systems of street surface and rapid transit railroads should be preserved intact
2820 and that the operation thereof should be continued under a unified control; that notwithstanding that every effort has been made to provide funds for the payment of the indebtedness and obligations of the several defendants or for the extension of the time of payment thereof, and for the completion of equipment required by the Subway Contract and by the certificates hereinbefore referred to, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all the creditors so that the operation of the said systems of street surface and rapid transit railways may be

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kept intact, great and severe loss will be inflicted on all the creditors and security holders of the several defendants and great and irreparable loss will result to the several defendants and to the general public.

TWENTY-FOURTH.—On information and belief, unless the Court, in view of the facts above set forth, shall take the property and assets of the defendants into judicial custody for the protection of every interest therein, that immediately individual creditors will assert their rights and remedies in 2822
different courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities; that levies will be made upon the materials and supplies indispensible to the operation, maintenance, construction and equipment of said lines of street surface and rapid transit railroads, and upon the power plants, sub-stations and facilities employed by the Transit Company in the furnishing of electrical energy to said lines of railroad will greatly interfere with and ultimately prevent the Subway Company and the Consolidated 2823
Company and the other Companies controlled by the Transit Company from the performance of their duties as common carriers, and that it will thus become impossible to continue the operation of the lines of said several companies to the serious inconvenience of the public and a most important and valuable property dismembered, which might be preserved by adequate judicial protection by this Court.

On information and belief, that an attempt by the plaintiff to enforce its claims as a general creditor would precipitate similar action on the part

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of other creditors and would in turn lead to wasteful strife and controversy, which plaintiff believes can be avoided, and the property preserved for equitable distribution among those entitled thereto only by the intervention of a court of equity; and the granting of equitable relief, including the appointment of a receiver.

In consideration whereof, and inasmuch as plaintiff has no adequate remedy at law and can have relief only in equity, plaintiff files this bill of complaint on behalf of itself and of all creditors
2825 of the several defendants who may come in and contribute to the expense hereof, and prays for equitable relief, as follows:

1. That the rights of the plaintiff and of all creditors of the several defendants may be ascertained and decreed, that the Court will fully administer the fund in which the plaintiff is interested, constituting the entire property and assets of the several defendants and ascertain the several and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of
2826 the creditors of the several defendants, as the same may be finally ascertained and decreed by the Court.

2. That for the purpose of preserving intact the property and assets of the several defendants a receiver or receivers may be appointed of each of the defendants and of all their respective properties and assets, real, personal and mixed, of whatsoever kind and description and wheresoever situated, with full power to sue for, collect, receive and take into his or their possession goods, chattels, rights, credits, moneys, effects, lands, tenements, books,

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papers, property and assets of every description of the defendants respectively, and with all the incidental powers ordinarily vested in receivers in like cases, and with full power and authority to operate the property and assets of the several defendants, and to collect and receive all the rents, issues and profits thereof, and to apply said rents, issues and profits under the orders or decrees of this Court for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property, and to preserve the corporate existence of the several defendants and to protect and 2828
preserve the property and assets of the several defendants from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve valuable rights and franchises of the several defendants or otherwise requisite or proper.

3. That at such times as may be found just and proper the properties of the several defendants may be ordered to be sold in whole or in part, in such manner and upon such terms and conditions as this 2829
Court shall deem just and equitable, and that any such order of sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors of the respective defendants, and shall provide for the sale of the property and assets of said companies, subject to or free and clear from any and all liens or encumbrances, in whole or in part, in such manner and upon such terms as this Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Court shall adjudicate, or that the properties of

2830 said several defendants may be returned to them, and that the plaintiff may have such other, further and different relief in the premises as to this Court may seem proper and as may be necessary fully to protect and enforce the rights and equities of the plaintiff, and of all the creditors and stockholders of the several defendants and each of them.

4. That temporarily and pending this suit, an injunction may issue against the defendants and all
2831 persons claiming and acting by, through or under them, or any of them, to restrain them from interfering with said receiver or receivers taking possession of said property and assets and that the plaintiff may have such other or further relief in the premises as the nature of the case may require and as may be agreeble to equity.

5. That the defendants be required to answer all and singular the matters above stated, but not under oath, answer under oath being hereby expressly waived.

2832 6. That a writ of subpoena may be granted to the plaintiff to be directed to the several defendants, Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, thereby requiring said defendants and each of them personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree therefor, as to the Court shall seem meet.

WALTER F. TAYLOR,
Solicitor for Plaintiff.

2833

State of New York,
County of New York,
Southern District of New York, } ss.:

GUY E. TRIPP, being duly sworn, deposes and says that he is an officer, to wit, chairman of the Board, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, the plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information 2834
and belief, and that as to those matters he believes it to be true.

GUY E. TRIPP.

Sworn to before me this
31 day of December, 1918.

LOUIS H. REUTER,
Notary Public, New York County.
N. Y. Co.'s Clerk's No. 228.
N. Y. Co. Register's No. 10,206.

2835

(Endorsed)

In the District Court of the U. S.—For the Southern District of New York—Westinghouse Electric and Manufacturing Company,—Plaintiff,—against—Brooklyn Rapid Transit Company,—New York Municipal Railway—Corporation, and New York—Consolidated Railroad Company,—Defendants.—Bill of Complaint—Walter F. Taylor—Solicitor—for—plaintiff—54 Wall Street,—Borough of Manhattan—New York City,—Filed December 31, 1918, at 6.40 P. M.—J. M. M.—D. J.

2836 **Government's Exhibit 35—Answer.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E 15-347.

2837

BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED
2838 RAILROAD COMPANY, defendants herein, hereby file their joint and several answer to the bill of complaint herein, or unto so much and such parts thereof, as said defendants are advised it is necessary or material for said defendants to make answer to and answering say:

FIRST.—The defendants admit all the allegations of said bill of complaint.

SECOND.—The defendants and each of them reiterating the admissions of the preceding Article First of this answer, join in the prayer of said bill

2839

of complaint and pray that this Court sitting in equity may take possession of the property and assets of each of said defendants through the appointment of a receiver or receivers as prayed in said bill of complaint, and thereby preserve the system of street surface and rapid transit lines of railroad controlled by the defendant, Brooklyn Rapid Transit Company, and thereby protect and preserve the corporate franchises, privileges, property and assets and preserve the corporate existence of the several defendants, and protect and preserve said systems of street surface and rapid transit 2840
railroads, and the property, real and personal of each of said defendants from being sacrificed under any proceedings which can or may be taken likely to prejudice or sacrifice the same, and do any and all acts which may be necessary to preserve the valuable rights, franchises, property and assets of the respective defendants; and the several defendants accordingly pray that inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for said defendants, this Court will, for the purposes aforesaid, appoint a receiver or receivers as prayed for in said complaint, and em- 2841
power and authorize such receiver or receivers to take possession of the entire property and assets of each of said defendants and to preserve, manage, operate and control the same, pay all indebtedness due or to become due by said defendants respectively, and otherwise discharge all the duties ordinarily imposed by courts upon receivers in similar cases; that on the final hearing in this cause this Court will, under said bill of complaint and this answer, or under such supplemental bill as may be filed herein, make such decree or decrees with respect to the property of each of said defendants

2842

as shall deal with the same on general equitable principles, that this Court will cause all the liens upon the property and assets of said respective defendants, or upon any part of said property and assets, and all rights and claims in equity of persons interested therein to be ascertained, defined and determined, and that the proceeds arising from the sale of said property and assets or any part thereof be applied under the orders or decrees of this Court according to the rights, interests and equities of the parties interested, and that this
2843 Court will direct all persons in possession of the property and assets of the respective defendants, or any part thereof, to surrender the same to such receiver or receivers or to hold such property and assets as such receiver or receivers may direct.

GEORGE D. YEOMANS,
Solicitor for
Brooklyn Rapid Transit Co., New York Municipal Railways Corporation and New York Consolidated Railroad Company, defendants,
Office and P. O. Address,
2844
85 Clinton Street,
Brooklyn, New York.

State of New York,
County of New York,
Southern District of New York, } ss.:

T. S. WILLIAMS, being duly sworn, deposes and says that he is an officer, to wit, President of BROOKLYN RAPID TRANSIT COMPANY, one

2845

of the defendants herein; that he had read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

T. S. WILLIAMS.

Sworn to before me this
31 day of December, 1918.

2846

JOHN A. DONOHUE, JR.,
Notary Public,
Kings County.
Kings Co. Clk. 6, Kings Co. Reg. 103.
New York Co. Clk. 14.
New York Co. Reg. 10010.
Queens County Clk. 992.
Commission expires March 30, 1920.

2847

State of New York,
County of New York,
Southern District of New York, } ss.:

C. D. MENEELY, being duly sworn, deposes and says that he is an officer, to wit, Vice-President of New York Consolidated Railroad Company, one of the defendants herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on in-

2848

formation and belief, and that as to those matters he believes it to be true

C. D. MENEELY.

Sworn to before me this
31 day of December, 1918.

JOHN A. DONOHUE, JR.,
Notary Public,
Kings County.

2849 Kings Co. Clk. 6, Kings Co. Reg. 103.
New York Co. Clk. 14.
New York Co. Reg. 10010.
Queens Co. Clk. 992.
Commission expires March 30, 1920.

(ENDORSED)—In the District Court of the U. S.—For the Southern Dist. of N. Y.—Westinghouse Electric and Manufacturing Company, plaintiff, against Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad
2850 Company, defendants.—Answer.—George D. Yeomans, Solicitor for defts.—Office and Post Office Address, 85 Clinton Street, Brooklyn, N. Y. City.—Filed December 31, 1918, at 6:40 P. M.—J. M. M., D. J.

Government's Exhibit 36—Order Appointing Receiver. 2851

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity, E 15-347.

2852

This cause came on to be heard at this term on the bill of complaint and the answer of the defendants hereto filed December 31, 1918, and thereupon, upon consideration thereof, the Court being fully advised in the premises, finds, adjudges and decrees as follows: Lindley M. Garrison is hereby appointed temporary receiver of the defendants Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, and of all the property and assets of said several defendants, real, personal and mixed of whatsoever kind and description, and wheresoever situated, including all power-houses, power plants and sub-stations owned, 2853

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leased or operated by the defendant Brooklyn Rapid Transit Company, and all railroads owned, leased or operated by the defendants New York Municipal Railway Corporation and New York Consolidated Railroad Company or either of them, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and

2855 in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue as well as all interest, easements, privileges and franchises, and all assets of every kind, character and description of each of the defendants herein. Said receiver is hereby authorized immediately to take possession of and to run, manage and operate the said properties and assets of the several defendants herein in such manner as will in the judgment of said receiver pro-

2856 duce most satisfactory results so that the operation of the system of street surface and rapid transit lines controlled by the defendant Brooklyn Rapid Transit Company shall be continued and the public duties obligatory upon the respective defendants be in all respects discharged, and to exercise the authority and franchises of the respective defendants and discharge their public duties and preserve and protect the properties and assets of said several defendants in proper condition and repair, and to protect the title and possession and to secure and develop the business of the same, and in the discretion of said receiver to employ and dis-

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charge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing. Said receiver is hereby authorized to collect and receive the rents, income, tolls and profits of the properties and assets of the defendants and each of them and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and said receiver shall have power to redeem any and all securities of the several defendants now pledged as security on loans of money 2858
and shall have power to borrow money if needful in his judgment in order to comply with this direction, and also, so far as may be necessary, to meet current requirements for labor, materials and supplies, and for the other purposes in this order expressly authorized, but for no other purpose without the further order of this Court; and said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property and trusts hereby reposed in him, and likewise to defend all actions insti- 2859
tuted against him as receiver and also to appear in and conduct the prosecution or defense of any suits now pending in any Court against the defendants or any of them, the prosecution and defense of which will in the judgment of said receiver be necessary for the proper protection of the property placed in his charge or the interests and rights of creditors connected therewith; and said receiver is hereby authorized in his discretion from time to time out of the funds coming into his hands to pay the expenses of operating said properties and executing his trusts and all taxes and assessments

2860 upon said properties or any part thereof, and all such rentals and installments as may fall or become due for the use of any portion of any of said properties; and also to pay and discharge all claims arising from the previous operation of said properties as in his judgment on examination are proper to be paid as expenses of operation and the current and unpaid payrolls and vouchers and supply accounts incurred in the operation of said property at any time within four months prior hereto. Said receiver is hereby required to open books of ac-
2861 count wherein shall be stated separately the earnings, expenses, receipts and disbursements in respect of the property of each of the defendants herein, and shall preserve proper vouchers for all payments made by said receiver.

The bond of said receiver in the sum of One Hundred Thousand Dollars conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands and abide by and perform all things which he shall be directed to do by this Court with sufficient sureties to be approved by
2862 a judge of this Court shall be forthwith filed in the office of the clerk of this Court.

Each of the defendants and all persons claiming and acting by, through or under them, or any of them, are hereby required and commanded forthwith upon demand of said receiver, or of his duly authorized agent, to turn over and deliver to said receiver, or his duly authorized agent, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, or other property in his hands, or under his control, and each of said directors, officers, agents and employees is hereby commanded and required to obey and

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perform such orders as may be given to them from time to time by said receiver or his duly authorized agent, in conducting the operation of the properties and assets of the respective defendants and in discharging his duties as receiver.

The defendants Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company and each of them, and their and each of their officers, directors, agents and employees, and all other persons claiming to act by, through or under said defendants, or any of them, are hereby enjoined 2864
from interfering in any way whatever with the possession or management of any part of the property over which the receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of said property, and any party in interest may apply for further direction;

IT IS FURTHER ORDERED that the parties hereto shew cause before this Court at Federal Building, Room 235, in the City of New York, on the 15th day of January, 1919, at eleven o'clock, in the forenoon, why said receivership should not 2865
be continued during the pendency of this suit, and upon the hearing thereon any other creditor of any of the defendants or any party in interest may be heard.

Dated, New York, December 31, 1918.

JULIUS M. MAYER,
U. S. District Judge.

2866

(Endorsed)

In the District Court of the U. S.—For the Southern District of—New York—Westinghouse Electric Manufacturing Company—Plaintiff—against—Brooklyn Rapid Transit Company,—New York Municipal Railway—Corporation and New York Consolidated Railroad Company,—Defendants.—Order appointing Receiver—Walter F. Taylor—Solicitor—for—Plaintiff—54 Wall Street,—Borough of Manhattan,—New York City. Filed December 31—1918 at 6.40 P. M.—J. M. M.—D. J.

2867

Government's Exhibit 38—Petition of Public Service Commission.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

2868

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity, E15-347.

Sirs:

You will please take notice, that upon the petition of the Public Service Commission for the First

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District, in the name and behalf of The City of New York, verified the 11th day of January, 1919; upon the bill of complaint of the Westinghouse Electric & Manufacturing Company, the plaintiff herein, verified the 31st day of December, 1918; upon the answer of the defendant companies thereto, likewise verified the 31st day of December, 1918; upon the order appointing a temporary receiver herein, entered by this Court on the 31st day of December, 1918, and upon all of the papers and proceedings had in this suit, the undersigned will move this Court, at Room Number 235 in the 2870
Federal Building, on the 15th day of January, 1919, at 11 o'clock in the forenoon or as soon thereafter as counsel may be heard, that the Public Service Commission for the First District acting in the name and behalf of The City of New York, be permitted to intervene and be heard in this suit, and that any further order made in this suit shall grant equitable relief along the lines more particularly set forth in the prayer for relief of the petition annexed hereto.

New York City, January 11, 1919.

2871

GODFREY GOLDMARK,
Solicitor for the Petitioner
the Public Service Commission for the First District.

WILLIAM L. RANSOM,
Of Counsel for the Petitioner.

To

WALTER F. TAYLOR,
Solicitor for the Plaintiff.

GEORGE S. YEOMANS,
Solicitor for the Defendants.

2872

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,
Plaintiff,
against

2873 BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY,
Defendants.

In Equity, 15-347.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

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The Public Service Commission for the First District of the State of New York, a public body existing under and by virtue of the Laws of the State of New York and vested thereby with certain powers and duties hereinafter more particularly set forth, files this its petition, in the name and behalf of The City of New York, for leave to intervene and be heard in the above-entitled cause in equity, and for other and further relief as hereinafter more fully prayed; and thereupon and in behalf of the application hereby made and the petitioner's claim of the interest of The City of New

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York in the litigation, the said Public Service Commission for the First District of the State of New York alleges as follows:

FIRST.—That the City of New York is, and at all the times hereinafter mentioned was, a domestic municipal corporation, organized and existing under and by virtue of its ancient charters and the Laws of the State of New York, and is, and at all the times hereinafter mentioned was, a city of more than one million inhabitants; and is, and at all the times hereinafter mentioned was, authorized and 2876
empowered to act, contract, sue and make applications to court, by and through such officers, boards and agents as may be provided by the Laws of the State of New York.

SECOND.—That the petitioner, the Public Service Commission for the First District of the State of New York (hereinafter referred to as "The Commission" or as the petitioner) is a public body existing under and by virtue of the laws of the State of New York and vested thereby with certain powers and duties, particularly those set forth in 2877
Chapter 48 of the Consolidated Laws of the State of New York, commonly known and hereinafter referred to as "The Public Service Commissions Law," and those set forth in Chapter 4 of the Laws of 1891, as amended, commonly known and hereinafter referred to as "The Rapid Transit Act."

THIRD.—That heretofore, on or about the 19th day of March, 1913, under and in pursuance of the Rapid Transit Act, The City of New York, acting by and through the petitioner, but with the approval and consent of the Board of Estimate and Ap-

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portionment of The City of New York, entered into a contract (commonly known and hereinafter referred to as "Contract No. 4") with the New York Municipal Railway Corporation (hereinafter referred to as the "Municipal Railway Corporation") for certain new rapid transit railroads, in and by which contract it was provided and agreed, among other things:

(1) That the City of New York would construct, provide and lease, and the defendant Municipal
2879 Railway Corporation would equip, operate and maintain, certain rapid transit railroads, as in said Contract No. 4 more particularly described, together with all stations and real estate or interests therein belonging to or used in connection therewith and all appurtenances thereto and all other property provided therefor and actually used in connection therewith, including trackage rights, tracks, terminals, storage yards and shops, which said rapid transit railroad, appurtenances and facilities are referred to and defined in the said Contract No. 4 and are sometimes hereinafter referred
2880 to, as "the Railroad";

(2) That the defendant Municipal Railway Corporation would contribute towards the cost of the construction of the said rapid transit railroads an amount not exceeding $13,500,000, and in addition thereto the cost of the construction of the physical connection between what were known as sub-divisions I and II of the Broadway-Fourth Avenue Line at Canal Street and Broadway in the Borough of Manhattan, City of New York;

(3) That in addition to equipping the rapid transit railroads and its contribution aforesaid

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towards the cost of construction thereof, the defendant Municipal Railway Corporation would, as in the said Contract No. 4 provided, so reconstruct and add to the railroads and equipment thereof belonging to the defendant New York Consolidated Railroad Company (hereinafter referred to as "the Consolidated Railroad Company") as in all respects to adopt them for operation in connection with the Railroad, which said railroads and the equipment thereof are in the said Contract No. 4 more particularly described, and are in the said Contract defined and sometimes hereinafter referred 2882
to as the "Existing Railroads";

(4) That the defendant Municipal Railway Corporation would operate and maintain the said Railroad, as so constructed and equipped, and the said Existing Railroads as so reconstructed and added to, each in conjunction with the other, as one system for a single fare. The petitioner herewith refers to the said Contract No. 4 for a full and complete statement of the provisions, terms and conditions thereof, and it is respectfully requested by the petitioner that such reference have 2883
the same force and effect as if the said Contract No. 4 were hereto annexed and fully embodied herein.

(5) That the title of the Equipment when and as provided and delivered on the Railroad and accepted by your petitioner shall vest in The City of New York free from all liens and encumbrances except those imposed pursuant to the said contract. That on the same day on which the said Contract No. 4 was entered into, your petitioner granted to the defendant Municipal Railway Corporation two

2884 certificates pursuant to the said Rapid Transit Act, to wit:

(a) A certificate for certain extensions to elevated lines of the defendant Consolidated Railroad Company and the operation of such extensions by the defendant Municipal Railway Corporation, with a provision for payment of compensation for the rights therein granted, as in the said certificate is more particularly set forth.

2885 (b) A certificate authorizing the construction of additional or third tracks upon certain of the existing lines of the defendant Consolidated Railroad Company and the operation thereof by the defendant Municipal Railway Corporation, with a provision for payment of compensation for the rights granted, as in the said certificate is more particularly set forth.

FOURTH.—That heretofore, on or about the 26th day of March, 1913, the defendant Municipal Railway Corporation, by an agreement bearing that date, duly assigned to the defendant Consolidated
2886 Railroad Company so much of the said Contract No. 4 and of the said certificate as provided for the right and obligation to operate and maintain the Railroad and the Existing Railroads aforesaid, which in and by the said Contract No. 4 the defendant Municipal Railway Corporation had the right and was under the obligation to maintain and operate as therein provided, and all rights with respect to such maintenance and operation or included in the leasing provisions of the said Contract No. 4, subject to all the terms and conditions in the said contract contained with respect to such mainten-

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ance and operation; that the said assignment was duly made and effected and the agreement therefor was duly executed and delivered, pursuant to the provisions of the said Contract No. 4 and by and with the approval and consent of the City of New York, acting by the petitioner, and of the said Commission, duly given and granted; and that, by virtue of the said assignments and of the said consents thereto, the defendant Consolidated Railroad Company then and there acquired and became possessed of, and has at all times since owned and possessed, and now owns and possesses, all and singular the 2888
rights and obligations under the said Contract No. 4 with respect to the maintenance and operation of the Railroad and Existing Railroads as therein provided. The petitioner herewith refers to the said agreement and assignments and the consents thereto, for a full and complete statement of the provisions, terms and conditions thereof, and it is respectfully requested by the petitioner that such reference have the same force and effect as if the said agreement and assignment and to the consents thereto were hereto annexed and fully embodied herein.

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FIFTH.—That by Article XLVIII of the Contract No. 4, it is provided with reference to the lease of the Railroad to the Municipal Railway Corporation (referred to in the said Contract as "the Lessee") for operation in conjunction with the Existing Railroads, as follows:

> "The City hereby leases the Railroad and Equipment to the Lessee for operation in conjunction with the Existing Railroads for a single fare. The lease shall be for a term

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beginning on the first day of January, 1917, and expiring at midnight on the thirty-first day of December, 1965; subject, however, to earlier termination as hereinafter provided. Provided, however, that if the completion of the construction of Subdivisions I and II of the Broadway-Fourth Avenue Line to a condition susceptible of operation shall, by reason of strikes, injunctions or other causes beyond the control of the Lessee, be delayed beyond the first day of January, 1917, the Lessee, if

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not instigating such strikes, or if not instigating or being responsible for such suits for injunctions or such other causes of delay, shall be entitled to an extension of time for the commencement and the expiration of the lease equal to the period between the first day of January, 1917, and the date when such subdivisions of the Railroad are actually ready for operation."

SIXTH.—That as rental for the use of the Rapid Transit Railroads agreed in and by the said

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Contract No. 4 to be constructed and leased by the City of New York, it is provided in Article XLIX of the said Contract, as follows:

"In consideration of the operation of the Railroad and the Existing Railroads in conjunction with each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid, upon the commencement of operation of Subdivisions I and II of the Broadway-Fourth Avenue Line, the gross receipts from whatever source derived directly or indirectly

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by the Lessee or on its behalf in any manner from out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the 'revenue') shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings and profits of the Railroad and the Existing Railroads."

2894 That it is provided in and by Article XLIX of said Contract that the amount of such income, earnings and profits are to be determined by deducting from the revenue, at the intervals therein prescribed the following deductions, therein more particularly set forth, in the order named, namely, such rentals for the use of property in connection with the Railroad and the Existing Railroads as are not included in operating expenses; taxes and other Governmental charges; operating expenses; twelve (12%) per cent. per annum of the revenue for maintenance exclusive of depreciation; three (3%) per cent. of the revenue for the first year of 2895 temporary operation for depreciation and thereafter an annual deduction for depreciation to be agreed upon between the Commission and the Lessee as prescribed by Paragraph 5 of Article XLIX; three million, five hundred thousand ($3,500,000) dollars per annum to be retained by the Lessee as representing the average annual income from the operation of the Existing Railroads during two years prior to the date of the beginning of the initial operation as defined in said Contract; six (6%) per cent. per annum upon the cost made or incurred by the defendant, Municipal Railway Corporation, for

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construction and equipment pursuant to said Contract No. 4 and the two separate certificates for additional tracks and for elevated railroad extensions therein referred to; actual interest and sinking fund upon the cost to the defendant, Municipal Railway Corporation, for additional equipment as defined in said contract provided by said defendant subsequent to the beginning of initial operation as therein defined; actual interest and sinking fund payable by The City of New York upon the cost to the City of construction for initial operation, as
2897 determined in accordance with the provisions of the said contract; interest and sinking fund actually payable by The City of New York, upon the cost to the said City of the construction of additions to the Railroad as the words "Additions" is in said contract defined; and one (1%) per cent. of the revenue as a contingent reserve fund until such time as such fund with additions and accretions thereon shall equal one (1%) per cent. of the cost of construction and the cost of equipment of the Railroad or the portions thereof remaining in operation. That the amount remaining after making
2898 all such deductions shall be deemed to be the income, earnings and profits of the Railroad and the Existing Railroads.

That it is further provided by Article L of the said Contract No. 4 as follows:

> "Of the income, earnings and profits of the Railroad and the Existing Railroads fifty (50%) per centum shall be paid to the City and the remaining fifty (50%) per centum shall be retained by the Lessee,"

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and by Article LI of the said Contract as follows:

> "If in any quarter year the revenue shall be insufficient to meet the various obligations and deductions referred to in Article XLIX, the deficits shall be cumulative and payments of such deficits shall be thereafter made in full before deducting the amounts required in the paragraph of such article, succeeding the paragraph providing for the payment of the obligations or deductions as to which there has been such deficit."

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That while Subdivisions I and II of the Broadway-Fourth Avenue Line, hereinbefore referred to, have not been completed, it is provided in Article LII of the said Contract No. 4 as follows:

> "Article LII. When and as the Commission shall declare parts of the Railroad to be ready for equipment the Lessee shall forthwith equip the same and when declared by the Commission to be ready for operation the Lessee shall forthwith commence the operation of such part or parts in connection with the Existing Railroads, including such part or parts of the extensions and additional tracks authorized by said certificates as may have been completed and may be ready for operation. The earnings of such part or parts shall be combined with those of the Existing Railroads and the revenue shall be distributed as provided in Articles XLIX, L and LI, except that the deductions provided for in paragraphs 7 and 9 of Article XLIX, shall be computed on the basis of the cost of construction and the cost of

2901

2902 equipment of such part or parts of the Railroad and such part or parts of the plant and property of the extension and additional tracks authorized by said certificates, and such part or parts of the Reconstruction of the Existing Railroads for Initial Operation as are placed in operation and except further that any deficit in the payments required to be made to the City instead of being cumulative shall be added to the cost of construction of the Railroad."

2903 That on August 1, 1913, a portion of the Railroad constructed under said Contract No. 4 was declared by your petitioner ready for operation on August 3, 1913, and since the latter date the earnings of the elevated or Existing Railroads and of the portions of the Railroad thereafter from time to time constructed have been pooled and the receipts disposed of as provided in said contract.

SEVENTH.—That in and by Section nine, Subdivision one of the Rapid Transit Act, an exception to the power generally vested in the Corporation
2904 Counsel of the City of New York to institute actions and proceedings and make necessary applications, in the name and in behalf of the City of New York, to maintain the rights and interests of The City of New York, is specifically created or recognized in the case of rights, claims and interests arising out of or by reason of the Rapid Transit Act, contracts made in pursuance thereof (such as Contract No. 4), and analogous affairs in that, in and as to such cases, the power is conferred upon the petitioner, the Public Service Commission for the First District, the said provisions of the Rapid Transit Act being as follows:

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"1. The said commission may rent such offices and employ such engineers, attorneys and other persons, from time to time, as it may, in its discretion, deem necessary to the proper performance by it of its duties as in this act prescribed. It may sue in the name and behalf of the City for which it acts as a commission. It may in the name of and in behalf of the said city bring action of specific performance or may apply by mandamus to compel the performance within said city by any corporation or person of any duty or obligation with reference to or arising out of the construction or operation of any railroad under, or by reason of, any grant made or right acquired under this act or the acts amendatory hereof or supplementary hereto, or out of or by reason of any contract made or authorized by any board or rapid transit railroad commissioners within its city or the public service commission, or it may in behalf of and in the name of said city bring actions to recover damages for any violation of contract or duty, or for any wrong committed by any such corporation or person by reason of any non-performance or violation of duty under the provisions of this act or under any contract or stipulation made in pursuance of any provisions of this act."

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Provision that the Commission "may sue in the name and behalf of the City" in this class of actions has been held by the State Courts to be equivalent to a provision that such an action or proceeding in the City's behalf must be brought by the Commission (*Hagadorn* vs. *Raux*, 72 N. Y., 583). Section 255 of the Greater New York Charter provides:

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"Sec. 255. There shall be a law department of The City of New York, the head whereof shall be called the corporation counsel, who shall be the attorney and counsel for The City of New York, the mayor, the board of aldermen and each and every officer, board and department of said city, except as otherwise hereby provided. The salary of the corporation counsel shall be fifteen thousand dollars a year. The corporation counsel shall have charge and conduct of all the law business of the corporation and its departments and boards, and of all law business in which The City of New York is interested, except as otherwise herein provided * * *."

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Section 45 of the Greater New York Charter provides:

"Sec. 45. Nothing in this act contained shall repeal or affect in any manner the provisions of the rapid transit acts applicable to the corporation heretofore known as the mayor, aldermen and commonalty of The City of New York, or any municipality united therewith or territory embraced therein * * *."

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That the foregoing statements of this paragraph are not made for the purpose of challenging or resisting in this proceeding any desire or claim of right on the part of the Mayor, the Comptroller, or other officer of The City of New York, to appear, intervene or be heard in this suit, in behalf of similar or other relief than that herein asked for, but for the purpose of making it clear to this Court that by and through this petition and application, there is before this Court a duly authorized applica-

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tion, by the statutory representative of The City of New York as to rapid transit matters, for the relief hereinafter asked. That the petitioner does not desire to be understood as here interposing any objection to the appearance and representation of The City of New York herein also by and through any other officials whom this Court may in its discretion permit to be heard.

EIGHTH.—That in the opinion of the petitioner, The City of New York is the party and corporation most vitally and heavily interested in this suit, 2912
the pending receivership, and the railroad properties formerly operated by the defendant companies and now by the temporary receiver. That in a very real and vital sense The City of New York is the principal creditor of the defendant companies and the party principally interested in the operations, revenues and expenditures of the defendant companies. That the total outlay and expenditure of The City of New York, under and pursuant to Contract No. 4, in and about the construction of the railroad properties being operated by the receiver, is already in excess of $110,000,000, and that 2913
the revenues and receipts from operation, under Contract No. 4, have thus far fallen at least $10,000,000 below and short of the expenses of operation, even aside from disputed items which the defendant company has been compelled by the petitioner to put in "suspense account," pending the outcome of the arbitration proceedings elsewhere referred to herein. That by reason of this financial interest of The City of New York, in that the said municipal corporation owns more of the property being operated by the temporary receiver than do the defendant companies, and in that the

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said municipal corporation possesses potentially the largest single claim against the future earnings of the defendant Consolidated Railroad Company, the petitioner feels that it would be both proper and advantageous that a co-receiver be selected and appointed, in especial recognition of the rights and interests of The City of New York as set forth in this petition.

NINTH.—That the said Contract No. 4 provides, in Article LVIII thereof, as follows:

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> "The Lessee covenants to and with the City that it will, during the term hereof, operate the Railroad and the Existing Railroads carefully and skillfully, according to the highest standards of railway operation, and with due regard to the safety of the passengers and employees thereof and of all other persons."

The said Contract No. 4 also provides, in Article LIX thereof, as follows:

> "The Lessee shall operate the Railroad and
2916 the Existing Railroads as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable."

Upon information and belief, that the above quoted and other covenants of Contract No. 4 have not been performed and fulfilled by the defendant Municipal Railway Corporation and by the defendant Consolidated Railroad Company, and that the petitioner has been advised by its Counsel that the said defendant companies are now in default under

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the said Contract and the assignments thereof, and that the City of New York, acting by and through the petitioner, is now entitled to proceed to enforce against the said defendant companies the right and remedies of the said City under the covenants of the said Contract. That the matter of the said contracts, and of the rights and remedies of the said City and of the defendant companies thereunder, is now in litigation in the courts of the State of New York, and the petitioner has under consideration the question as to what other and further steps should be taken by it to enforce and preserve the 2918
rights and remedies of The City of New York in and as to these properties and in and under the said Contract No. 4. That the pendency of these controversies and their importance to the finances, rights and interests of The City of New York, make important the representation of the said City's rights and interests in the conduct of the pending receivership.

TENTH.—That in and by the said Contract No. 4 it is provided, as hereinbefore more particularly set out, that the Railroad and the Existing Railroads 2919
shall be operated as a unified system for a single fare. That the "single fare" now in force upon the system of the defendant companies is a fare of five cents for a continuous trip, and that such rate of fare may not be increased by the defendant companies without the consent and approval of The City of New York acting by and through the Commission, and also the consent of the Board of Estimate and Apportionment of the City of New York. That the bill of complaint herein, particularly Paragraph "Twenty-first" thereof, is deemed by the petitioner to disclose a belief and contention upon

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the part of the complainant that the rate of fare now in force under Contract No. 4 is inadequate under existing conditions and that the Court, or the receiver under its directions, should and will be called upon to deal with such single fare and the present rate. That with respect to the fare provisions of a contract analagous to Contract No. 4, the Court of Appeals of the State of New York has recently declared (Matter of International Ry. Co. vs. Rann, 224 N. Y., 83), that

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> "Few rights of property are of more immediate concern to a greater proportion of the population than the right to ride on the street cars for a small sum."

That the same Court has also ruled, in the same case, as to the property right of the municipality under and with respect to an agreement for a low, single rate of fare, as follows:

> "Is the provision in the Milburn agreement for a five-cent fare a right of the City of Buffalo? That which is directed by law for
2922 one's protection and advantage is said to be one's right. The rate of fare provision of the Milburn agreement unquestionably secures valuable rights to the inhabitants of Buffalo which they did not previously possess. The city owing or assuming to owe to its inhabitants, the patrons of the street railroad companies, the duty of obtaining more favorable rates, entered into an agreement for their benefit which they may enforce. * * *"
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> "The agreement confers rights upon the City of Buffalo. The city may terminate it for non-

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performance or it may release the railroad companies from performance or consent to modify its terms, or it may compel performance by suit (Wash. Co. Water Co. vs. Hagerstown, 116 Md., 497). The city is the real party to the agreement. * * *"

"The right of the inhabitants of the City of Buffalo to ride on the street railroad for a five-cent fare is a property right; a right enforcible in the courts, not depending upon another's courtesy or forbearance. By the use of 'a convenient fiction' (People vs. North River S. R. 2924
Co., 121 N. Y., 582, 622), it may be plausibly pressed that such rights are not the rights of the City of Buffalo, but if we look at the substance of things we must conclude that the common rights of the inhabitants of the city, secured through the agency of the city officials, are rights of the city and that the resolutions of the council thus modifying the Milburn agreement through the same agency come peculiarly within the description of resolutions 'disposing of rights of the City.' They make an end to the present five-cent fare and add 2925
twenty per cent. to the burdens of the traveler. Few rights of property are of more immediate concern to a greater proportion of the population than the right to ride on the street cars for a small sum."

ELEVENTH.—That as bearing further upon the question whether the Honorable Lindley M. Garrison, the temporary receiver named by this Court, should be continued as sole receiver during the pendency of this suit, or whether a co-receiver may not preferably be named, the better to secure and

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assure representation of the public rights and interests of The City of New York in the properties, as well as the interests, views and contentions of the defendant companies, your petitioner makes reference to the fact that, pursuant to the provisions of Articles XXIX, XXX and XXVII of the said Contract No. 4, an arbitration is pending and is about to be had between The City of New York, acting by your petitioner, and the Consolidated Railroad Company, concerning the rightfulness of the claim of the Consolidated Railroad Company
2927 that it is entitled to charge to operating expenses under the said Contract No. 4, and so in effect against The City of New York and its prospects of earning even interest upon its large investment in the properties being operated by the defendant companies, the expenses of settling, paying or defending more than $2,000,000 of claims against the defendant companies, arising out of a certain wreck on the lines of the defendant Consolidated Railroad Company on November 1, 1918, commonly known as the Malbone Street tunnel disaster, on account of which five officers of the defendant companies
2928 are under indictment by the Grand Jury of Kings County, on charges involving derelictions of duty and lack of care as officers of the defendant companies. That the Consolidated Railroad Company and the defendant companies have asserted and claimed a right to charge all of these damages and expenses in such a way that the same would fall upon monies otherwise payable to The City of New York as interest upon its investment. That to maintain this assertion, claim and contention on the part of the defendant companies, and to resist, and if possible, to overcome, the contrary contentions of the City of New York acting by your

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petitioner, the defendant companies have brought about an arbitration of the said matter, pursuant to the said provisions of the said Contract No. 4. That before the said thirty-first day of December, 1918, but within that month, the board of arbitrators had been selected and was about to begin its sessions, to determine whether The City of New York or the defendant companies should be sustained in their respective contentions. That as its member of and representative in the said board of arbitrators, your petitioner had named the Honorable Louis Marshall; that as its member of and 2930
representative in the said board of arbitrators to pass upon the claims and contentions of the City of New York, the defendant Consolidated Railroad Company had named the Honorable Lindley M. Garrison, now the sole temporary receiver herein; and the Commission and the Company having been unable to agree upon a third or neutral arbitrator, the Honorable Charles E. Hughes had been named as such arbitrator by the Chief Judge of the Court of Appeals of the State of New York. That in the pending arbitration, the Honorable Lindley M. Garrison, by an instrument duly signed 2931
and executed by him and filed with your petitioner, prior to the said 31st day of December, 1918, had agreed to act as the arbitrator appointed by the defendant Consolidated Railroad Company in this matter. That as temporary receiver of the defendant companies, he will now be obliged to name a company representative, to serve in his place and stead in the board of arbitrators, in determining whether the company may charge against the City of New York these damages and expenses undeniably caused by the negligence of the defendant companies, or some of them; and the said defend-

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ant companies have advised your petitioner that the matter of the selection of a successor to the Honorable Lindley M. Garrison as the arbitrator named by the companies is now in the hands of, and will shortly be determined by, the Honorable Lindley M. Garrison as the sole temporary receiver appointed by this Court.

That the receiver or receivers of the defendant companies will also soon be called upon to decide whether they will continue and prosecute an action brought by the defendant Consolidated Railroad
2933 Company and the defendant Municipal Railway Corporation, on or about the tenth day of December, 1918, against the City of New York and the members of the Public Service Commission for the First District, at that time in office, relative to various matters which will have to be dealt with by the receiver or receivers. That the said action was instituted by these two defendant companies, by and through their attorney at that time, who now is still their attorney and is also, by the direction of the said temporary receiver, still acting with reference to various matters within the scope of the
2934 present receivership, as shown by the order entered herein on the 31st day of December, 1918. That a decision concerning what shall be done as to this action and its subject-matter will soon have to be reached by the receiver or receivers, and important interests of the City of New York depend thereon, no less than do the interests of the material-men and of the defendant companies. That your petitioner believes that the foregoing facts tend further to demonstrate the propriety of the appointment as a co-receiver of some person who has not heretofore represented or been designated to represent the defendant companies or any of

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them adversely to the City of New York, as to any matters which will have to be dealt with by and during the receivership.

TWELFTH.—Upon information and belief, that although the temporary receiver appointed by this Court on the 31st day of December, 1918, has, under the decree of this Court, assumed possession, control and operation of more property belonging to The City of New York than he has of property belonging to the defendants the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company, and although The City of New York is in reality and in the ultimate accounting the largest single creditor of these defendants and the interests of the plaintiff and all other known creditors of the defendants are in comparison infinitesimal, the said temporary receiver has, in the opinion of your petitioner, failed to take such steps or pursue such a course as would indicate and establish a purpose on his part to act in behalf of, and to recognize and conserve, the rights and interests of The City of New York, rather than merely or primarily the interests of the plaintiff and other material-men and similar minor creditors, and the interests of the defendant companies, by whose admissions, consent, and request the said decree of the 31st day of December, 1918, was entered herein and the said temporary receiver thereby appointed. That on the first day of January, 1919, the day following the appointment of the said receiver, your petitioner, the Public Service Commission of the State of New York for the First District, duly advised and apprised the said temporary receiver, through the intermediary of an as-

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sistant counsel of the said defendant companies, designated and retained by the said temporary receiver to act with respect to company matters as heretofore, that your petitioner would be glad to have a conference with the temporary receiver, at the earliest practicable moment, to discuss matters of importance to the public and to The City of New York, relative to the affairs and properties of the defendant companies and the service rendered upon the lines being administered by and through the temporary receivership. That on Jan-

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uary 3, 1919, in pursuance thereof, the temporary receiver advised the Commission by letter that he hoped to have such a conference "in the near future." That subsequently and on or about the 6th day of January, 1919, your petitioner, by and through its Secretary, informed and advised the said temporary receiver, in writing, in substance, that the members of your petitioner would be glad to have an early opportunity to confer with him concerning matters of importance to the public and of probable utility to the said temporary receiver. That on the 9th day of January, 1919, your petition-

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er by and through its special counsel retained for the purpose of this proceeding, informed and advised the said temporary receiver, in writing, in substance, that if it at any time he desired to confer with the members of your petitioner or with its special counsel, relative to the public interests, properties and rights involved in these proceedings, such special counsel would be pleased to bring about such a conference, to aid the temporary receiver in acting upon full information and adequately representing and protecting the public interests. That no such conference between the said temporary receiver and any members of your peti-

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tioner has been held and nothing has been done by him to that end, beyond an expression, through a letter received by the petitioner on January 10, 1919, of desire or willingness to hold such a conference "so soon as I have acquired sufficient knowledge of the subject matter to make it useful to do so." From what sources the said temporary receiver expects to acquire "sufficient knowledge of the subject-matter to make it useful" for him to consult and confer with the representatives of the public interest and custodians of the expert and disinterested information gathered at public 2942
expense for the use of public authorities, has not been made to appear. Upon information and belief, that not only has the said temporary receiver failed and neglected to hold any conferences with, or obtain and utilize the available information of your petitioner and its expert staffs, maintained at public expense for the particular purpose of making complete scientific and impartial information available to public representatives desiring the same, but also the said temporary receiver has held no conferences with the Mayor, Comptroller or other member of the Board of Estimate and 2943
Apportionment of The City of New York, with respect to the municipal funds and properties, and the public rights and interests so vitally affected by the receivership. That on the contrary, without ascertaining the views and wishes, or obtaining the benefit of the information, of the duly authorized or other representatives of the City of New York, the principal creditor of the defendant companies and the principal investor in the properties being administered by the receivership, the temporary receiver has been in continuous touch and very frequent conference with the officers of and attor-

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neys for the defendant companies; has toured and inspected the system and properties only in the company of officers of the defendant companies whose derelictions are the subject-matter of pending proceedings in the civil and criminal courts; and has employed, retained and continued in the legal work incident to the affairs under his direction the members of the legal department of the defendant companies, whose efforts have lately been, and are, mainly put forth to defend, shield and protect those officers of the defendant com-
2945 panies from the criminal charges for which they have been indicted and are about to be tried. That in a number of unfortunate respects, which your petitioner greatly regrets, the said temporary receiver in pursuance of and in evident reliance upon this interested, biased, prejudiced and prejudicial information and advice, has made and published purported statements of fact and opinion which your petitioner does not believe he would conceivably have made, if he had seasonably conferred with representatives of either the Public Service Commission for the First District or the Board of
2946 Estimate and Apportionment of The City of New York, or if representatives of the public interests had accompanied him upon the tours which he made by way of inspection of receivership properties, in company only of representatives of the defendant companies, whose official acts are under scrutiny in the Courts of the State of New York. Upon information and belief that the said temporary receiver has also publicly announced that, at least for the present, he will make no changes in the personnel of the officials of the defendant companies, whose management and operation of the lines of the defendant companies, and whose at-

titude towards public rights and interests, have been so severely and particularly criticised by your petitioner, by the members of the Board of Estimate and Apportionment of The City of New York, and by Courts of the State of New York, and that he will make no changes in the salaries of these officers, some of which reach figures which may in part account for any inability of the defendant companies to pay to the plaintiff Westinghouse Electric and Manufacturing Company the paltry $40,235.72 owed to it by the Transit Company. Concerning these officials and this management, whose operating tenure as to property built with City money the temporary receiver disclaims any intent to terminate, your petitioner declared, through the adoption by the Commission of a formal opinion submitted by one of its members on November 9, 1918:

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"In course of the memorandum which I filed in this matter three weeks ago, in connection with the denial of the companies' application for a modification of the 250-car Order, I said:

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" 'Do the owners of the companies appreciate that the public is ready to do justice when the company officials have kept the faith and have honestly tried to serve the public? When will the owners realize that in their own interests it may be wise to dispense with a regime rebellious to law and public obligations, and to substitute officials who can recognize the public character of a private enterprise, and who, while striving to make the business a success, can, with a will to please, be frank, honest and above

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board with public officials and the public. There have been notable examples of company officials who have been both successful and popular, and, therefore, assets, rather than liabilities, to their companies and to the public. Such men never pledge lightly the "good faith" of their companies.'"

"That characterization of the official regime which dominates the surface, elevated and subway system in Brooklyn, derives added per-
2951 tinency and force from every revelation of the course pursued by these companies. Resistance to legal mandates, defiance of public obligations, disregard of the comfort and safety of passengers, disruption and overthrow of any kind of public control over their operations, seem to be the dominant motives of the company officials responsible for what has taken place in this case. These companies will no doubt soon be required, by judicial mandate, to comply with the present order, which they have so persistently flouted; but there can be
2952 no real responsiveness of these companies to public needs and no co-operation between the companies and the Commission so long as the affairs of the companies are in the hands of men who have so lightly treated their pledged word and so defiantly disregarded both the Commission's order and their own promises."

THIRTEENTH.—That as appears from the bill of complaint herein, the defendant, Brooklyn Rapid Transit Company, does not own or operate any rapid transit or street surface railroad, but owns all or a controlling interest in the stock of the

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operating companies, and thus controls and directs their finances and affairs, although it is not a railroad or street railroan corporation, and is not as such subject to the jurisdiction of the petitioner, but is in the category of what is commonly termed a "holding company." That the defendant, Brooklyn Rapid Transit Company, does, however, as appears by the bill of complaint herein, own substantial quantities of the equipment, power-houses, repair facilities and the like, necessarily used by the street surface railroad companies referred to in Paragraph "Ninth" of the bill of complaint, and 2954
those companies are thus not only controlled by the defendant, Brooklyn Rapid Transit Company, through stock ownership as aforesaid, but also are altogether dependent upon the defendant "holding company" for equipment, power and upkeep of rolling stock. That in consequence the receiver or receivers appointed by this Court will be in virtual control and direction of the operations and affairs of these street surface railroad companies. That in the opinion of the petitioner, a continuance of this system of nominal or "paper" operating companies, and a "holding company" possessed of all 2955
the real power and authority but responsible to no regulatory control, by the Commission or otherwise, is inimical to good service and the public interests. That it would be exceedingly unfortunate, in the opinion of the petitioner, alike for the public and for the investors in the securities of the defendant companies, if the outcome of this suit and the pending receivership were anything less than such a reorganization of the defendants and their affiliated companies as would bring to an end the evils and abuses from which the public and the investors have alike suffered. That the petitioner accord-

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ingly begs leave to suggest to this Court that these "paper" companies, nominally operating street surface railroads mentioned in Paragraph "Ninth" of the bill of complaint, ought to be brought suitably within the purview of any relief granted under the bill of complaint herein, to the end that any reorganization plan evolved in this proceeding shall be constructive, remedial, comprehensive and adequate, and may bring to an end the transit evils hitherto endured by The City of New York and by its inhabitants within the area supposedly served
2957 by the Brooklyn Rapid Transit Company system. That in the opinion of the petitioner there can be no sound reason for permitting the scope and purview of whatever remedial action is now or hereafter taken herein to be limited by the corporate "shell" interposed by these street surface railroad companies.

FOURTEENTH.—That on the first and the second days of January, 1919, the petitioner caused it to be announced in the public press that upon the 15th day of January, 1919, it would make to this Court the application hereby made. That on the
2958 10th day of January, 1919, the petitioner, through its special counsel in the matter, informally advised and notified the solicitors of record for the plaintiff and the defendants in this suit that this application would be made to this Court on the 15th day of January, 1919, and that the necessary motion papers to that end would be served upon them on or before the 11th day of January, 1919.

FIFTEENTH.—That no previous application has been made by the petitioner to any Court or Judge for any of the relief herein asked for.

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SIXTEENTH.—That the foregoing allegations of this petition are not intended by the petitioner and should not be deemed or construed to be in any respect in criticism or derogation of the appointment of the Honorable Lindley M. Garrison, as temporary receiver, or of his appointment and continuance as one of the receivers during the pendency of this suit, if there be such a continuance of the receivership. That, on the contrary, the petitioner recognizes the excellent executive, personal and professional qualifications of the present temporary receiver to be and continue as one of 2960
the permanent receivers of the properties of the defendant companies. The belief and contention of the petitioner is that, whomsoever may be named a permanent receiver with reference to the matters and interests set forth in the bill of complaint of the Westinghouse Electric and Manufacturing Company, there should be also named a co-receiver in view of and with reference to the large financial interest of The City of New York in properties, operations and finances of the defendant companies, and that the receivership should be continued, if at all, only upon that basis and upon such an 2961
appointment of co-receivers.

SEVENTEENTH.—The petitioner desires also to be granted leave to intervene and be heard in this proceeding, so that it may be in position to aid the Court, the receivers, the creditors of the defendant companies, and all others having an interest in the litigation, in the working out of a reorganization plan which shall be constructive, comprehensive, remedial, adequate for the protection of all public rights and interests, and sufficiently thoroughgoing to ensure the permanent improvement of trans-

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portation service in Brooklyn. As the legally authorized representative of the City and the public, in matters of transportation, your petitioner is a peculiarly necessary party to a proceeding which looks to future reorganization and reconstruction, as well as present debts, and lays hands on the vital elements in the transportation problem and in which the action of this Court will definitely and fundamentally determine the future conditions of transportation on lines so important to the City of New York and to the public.

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IN CONSIDERATION WHEREOF, and for the reasons and in view of the facts and circumstances hereinbefore set out, the petitioner prays that any further Order made in this suit shall grant equitable relief along the following lines, among others:

(1) That if the receivership created by the Order made by this Court on the 31st day of December, 1918, be continued during the pendency of this suit, a co-receiver be also appointed, in view of the large investment of The City of New York in the railroads and equipment being and to be operated under such receivership, the said City's ownership of a large part of such railroad properties and its vital interest in the operation of the said properties, the receipts and expenses thereof, and the future disposition thereof.

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(2) That the said Public Service Commission for the First District acting in the name and behalf of The City of New York, be permitted to intervene and be heard in this suit, and to present for the consideration of this Court and of the receiver or receivers appointed herein such suggestions and

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recommendations as seem to it necessary for the protection of the properties, rights and interests of The City of New York, respecting the operations, affairs and finances of the defendant companies, and respecting the service rendered to the public during the continuance of such receivership and the rates of fare chargeable therefor, and respecting any reorganization plan which may be the outcome of this suit, and respecting the rights and obligations of The City of New York and the defendant companies under and by virtue of the certain contract made and entered into on the 19th day of 2966
March, 1913, between The City of New York, acting by and through the said Public Service Commission for the First District and the defendant, New York Municipal Corporation, commonly known as Contract No. 4; and

(3) That The City of New York and the said Public Service Commission for the First District, have such other and further relief as to this Court, upon this hearing or afterwards, may seem just and proper.

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PUBLIC SERVICE COMMISSION FOR
THE FIRST DISTRICT,
By TRAVIS H. WHITNEY,
Acting Chairman.

GODFREY GOLDMARK,
Solicitor for the Petitioner, the Public Service Commission for the First District.

WILLIAM L. RANSOM,
Of Counsel for the Petitioner.

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State of New York,
County of New York,
Southern District of New York, } ss.:

Travis H. Whitney, being duly sworn, deposes and says that he is a member, and the Acting Chairman of the Public Service Commission for the First District, the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged
2969 upon information and belief, and that as to those matters he believes it to be true.

TRAVIS H. WHITNEY.

Sworn to before me this 11th
day of January, 1919.

WILLIAM G. FULLER,
Notary Public,
New York Co. No. 175.
(Notarial Seal)

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Government's Exhibit 40—Answer to Petition of Public Service Commission. 2971

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,
Plaintiff, 2972

against

BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY,
Defendants.

In Equity
E 15-347.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK: 2973

Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, defendants herein, hereby file their joint and several answers to the petition of the Public Service Commission for the First District of the State of New York, assuming to act herein in the name and on behalf of the City of New York, or unto so much and such parts

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of said petition as said defendants are advised it is necessary or material for said defendants to make answer to, and answering say:

I. The defendants admit the allegations contained in paragraphs designated "First," "Third," "Fourth," "Fifth" and "Sixth" of said petition.

II. The defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in para-
2975 graphs designated "SECOND," "SEVENTH," "FOURTEENTH," "FIFTEENTH" and "SIXTEENTH" of said petition, except the defendants admit that on January 10, 1919, William L. Ransom, representing himself as special counsel for the petitioner in this matter, notified the solicitor of record for said defendants that application would be made to this court on January 15, 1919, for leave to intervene and for the appointment of a co-receiver of said defendants and that motion papers to that end would be served on or before January 11, 1919.

2976 III. The defendants deny each and every allegation contained in paragraph designated "EIGHTH" of said complaint except the defendants deny they have knowledge or information sufficient to form a belief as to the truth of the allegation in said paragraph contained that "the petitioner feels that it would be both proper and advantageous that a co-receiver be selected and appointed in especial recognition of the rights and interest of The City of New York as set forth in this petition."

IV. The defendants deny each and every allegation contained in paragraph designated "NINTH"

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of said petition, except the said defendants admit that Articles LVIII and LIX of Contract No. 4, provide in part as in said paragraph set forth, and except the said defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation in said paragraph contained that the petitioner has been advised by its counsel that the defendants New York Municipal Railway Corporation and New York Consolidated Railroad Company are now in default under the contract and assignment referred to in said paragraph "NINTH" and that The City 2978
of New York, acting by and through the petitioner, is now entitled to proceed against said defendants to enforce the rights and remedies of the City under the covenants of said contract and the defendants further deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegation that the "petitioner has under consideration the question as to what other and further steps should be taken by it to enforce and preserve the rights and remedies of The City of New York in and as to these properties and in and under the said Contract No. 4." 2979

V. The defendants admit the allegations contained in paragraph designated "TENTH" of said complaint, that in and by Contract No. 4 it is provided that the Railroad and the Existing Railroads shall be operated as a unified system for a single fare of five cents for a continuous trip, except as otherwise provided in Article LXII of said contract, and that "such rate of fare may not be increased by the defendant companies without the consent and approval of The City of New York,

2980 acting by and through the Commission and also the consent of the Board of Estimate and Apportionment of The City of New York," but the defendants deny knowledge or information sufficient to form a belief as to the truth of each and every other allegation in said paragraph "TENTH" contained.

VI. The defendants admit the allegations contained in paragraph designated "ELEVENTH" of said petition, except that the defendants deny that
2981 the arbitration referred to in said paragraph "ELEVENTH" involves the determination whether the damages and expenses occasioned by the wreck referred to in said paragraph "ELEVENTH" are to be charged against the City of New York, and that these defendants further deny that said damages and expenses were caused by the negligence of said defendants or any of them, and except that these defendants further deny the imputations against the temporary receiver of the defendants and against the attorney for the defendants contained in said paragraph "ELEVENTH,"
2982 and particularly in the sentence of said paragraph reading: "That your petitioner believes that the foregoing facts tend further to demonstrate the propriety of the appointment of a co-receiver of some person who has not heretofore represented or been designated to represent the defendant Companies or any of them adversely to The City of New York, as to any matters which will have to be dealt with by and during the receivership."

VII. The defendants deny the allegations contained in paragraph designated "TWELFTH" of said petition that the temporary receiver appoint-

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ed by this court on December 31, 1918, has, under the decree of this court, assumed possession, control and operation of more property belonging to The City of New York than of property belonging to the said defendants, and deny that The City of New York is a creditor of said defendants or of either of them. The defendants deny that they have any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in said paragraph "TWELFTH" contained, except the defendants are informed that the petitioner requested a conference at the earliest 2984
practicable moment with the temporary receiver appointed by this court and that said temporary receiver expressed a willingness to hold such a conference as soon as he had acquired sufficient knowledge of the subject matter to make such a conference useful, and except the defendants admit that said temporary receiver has retained in performance of their customary duties the officers and employes of said defendants and has consulted with such officers and employes and has inspected the properties of the said defendants with a view to acquiring knowledge of the subject and with a 2985
view to making his reports to this court, and the defendants allege that in view of the temporary nature of the appointment of the receiver and of the short time that has elapsed since his appointment, no other course could properly have been pursued by said receiver.

VIII. The defendants admit the allegations of paragraph designated "THIRTEENTH" of said petition that the defendant Brooklyn Rapid Transit Company does not own or operate any rapid transit or street railway, but owns all or the con-

2986 trolling interest in the stock of the operating companies; that said defendant Brooklyn Rapid Transit Company is not a railroad or street railroad corporation and is not as such, subject to the jurisdiction of the Public Service Commission for the First District of the State of New York; that the defendant Brooklyn Rapid Transit Company does own substantial quantities of the equipment, power houses, repair facilities and the like used by street surface railroad companies referred to in the bill of complaint herein, and that such companies are
2987 dependent upon the defendant Brooklyn Rapid Transit Company for equipment, power and upkeep of rolling stock; and that to such extent the receiver of said defendant Brooklyn Rapid Transit Company appointed by this court will be in control of the operation and affairs of said street surface railroad companies referred to in the bill of complaint herein, and that such companies are dependent upon the defendant Brooklyn Rapid Transit Company for equipment, power and upkeep of rolling stock; and that to such extent the receiver of said defendant Brooklyn Rapid Transit Com-
2988 pany appointed by this court will be in control of the operation and affairs of said street surface railroad companies. On information and belief the defendants deny each and every other allegation in said paragraph "THIRTEENTH" contained.

IX. The defendants deny that they have any knowledge or information sufficient to form a belief as to each and every allegation of the petition herein not otherwise specifically admitted or denied.

The Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, defendants

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herein, for further joint and several answers to the petition of the Public Service Commission for the First District for the State of New York herein or unto so much and such parts thereof as said defendants are advised it is necessary or material for said defendants to make answer to, and answering say:

X. That as alleged in paragraph "THIRD" of said petition, The City of New York, acting by and through the petitioner, with the consent and approval of the Board of Estimate and Apportionment of said City, on March 19, 1913, entered into a contract with the defendant, New York Municipal Railway Corporation, commonly known and hereinafter referred to as "Contract No. 4," for new rapid transit railroads, in and by which contract it was provided and agreed, among other things, substantially as set forth in said paragraph "NINTH," and that contemporaneously with the delivery of said contract the petitioner issued to the defendant, New York Municipal Railway Corporation, and said defendant accepted two certain certificates, one for construction, equipment, maintenance and operation of certain extensions of, and the other for the construction, equipment, maintenance and operation of certain additional tracks to, the existing elevated railroads belonging to the defendant, New York Consolidated Railroad Company. For a full and complete statement of the provisions, terms and conditions of Contract No. 4, a copy of said contract is annexed hereto, marked Exhibit A and made a part of this answer as if here set forth at length.

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XI. That as alleged in paragraph "FOURTH" of said petition, the defendant, New York Municipal

2992 Railway Corporation, assigned to the defendant, New York Consolidated Railroad Company, and said defendant thereby became possessed of and has at all times since owned and possessed and now owns and possesses all and singular the rights and obligations of said defendant, New York Municipal Railway Corporation, under said Contract No. 4 and under said Certificate with respect to the operation and maintenance of the Railroad and Existing Railroads and of the extensions and additional tracks therein and in said paragraph
2993 "NINTH" referred to.

XII. That as alleged in paragraph "FIFTH" of said petition, The City of New York in and by Article XLVIII of Contract No. 4 leased to the defendant, New York Municipal Railway Corporation, the Railroad to be constructed by said City and to be equipped and operated by said defendant, as described and provided for in said contract, in conjunction with the Existing Railroads of the defendant, New York Consolidated Railroad Company, reconstructed and added to as provided for in Article XIII of said contract, as one system for
2994 a single fare, for a term to begin on January 1, 1917, or at such later date as the construction of Subdivisions I and II of the Broadway-Fourth Avenue Line described in said contract should be completed by the City to a condition susceptible of operation; that The City of New York has not as yet completed the construction of Subdivisions I and II of said Broadway-Fourth Avenue Line to a condition susceptible of operation, and the terms of said lease has not as yet commenced.

XIII. That as alleged in paragraph "SIXTH" of said petition, Contract No. 4, provides in and

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by Article XLIX and L thereof that The City of New York is to receive, as rental for the use of the rapid transit railroads by it in said contract agreed to be constructed and leased, fifty per centum (50%) of the income, earnings and profits of the Railroad and the Existing Railroads determined by deducting from the gross receipts of such operation, at the intervals therein prescribed and in the order there named, the deductions substantially in said paragraph "SIXTH" and more particularly in Article XLIX of said contract set forth; and that as alleged in paragraph "SIXTH" 2996
of said petition, it is provided in Article LI of said contract that, "if in any quarter year the revenue shall be insufficient to meet the various obligations and deductions referred to in Article XLIX, the deficits shall be cumulative and payments of such deficits shall be thereafter made in full" before deducting the amounts required in the paragraph of said article next succeeding that as to which there has been such deficit.

XIV. That provision is made in and by Article LII of Contract No. 4 for what is commonly re- 2997
ferred to as "temporary operation"; namely, that prior to the commencement of the term of the lease as provided for in Article XLVIII of said contract, and "when and as the Commission shall declare parts of the railroad to be ready for equipment the Lessee shall forthwith equip the same and when declared by the Commission to be ready for operation the Lessee shall forthwith commence the operation of such part or parts in connection with the Existing Railroads, including such part or parts of the extensions and additional tracks as may have been completed and may be ready for

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operation." It is further provided in and by Article LII of said Contract that the "earnings of such part or parts shall be combined with those of the Existing Railroads and the revenue (meaning thereby the gross receipts) shall be distributed as provided in Articles XLIX, L and LI, except that the deductions provided for in paragraphs 7 and 9 of Article XLIX, shall be computed on the basis of the cost of construction and cost of equipment of the parts so placed in operation, and except that any deficits in the payments required to
2999 be made to the City, instead of being cumulative and entitled to payment as provided for in Article LI of said contract, shall be added to the City's cost of construction of the Railroad.

XV. That on August 1, 1913, as alleged in paragraph "SIXTH" of said petition, a part of the Railroad constructed by The City of New York under Contract No. 4 was declared by the petitioner herein to be ready for operation on August 3, 1913; that on August 3, 1913, the defendant, New York Consolidated Railroad Company, as assignee aforesaid of the defendant, New York Municipal Rail-
3000 way Corporation, commenced to operate such part of the Railroad in connection with the Existing Railroads; that from time to time since August 3, 1913, the petitioner herein has declared other parts of the Railroad to be ready for operation and, when so declared to be ready for operation, said defendant, New York Consolidated Railroad Company, has forthwith commenced to operate the same in connection with the Existing Railroads; that on and at all times since August 3, 1913, said defendant, New York Consolidated Railroad Company, has operated such parts of the Railroad in

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connection with the Existing Railroads under what is known as "temporary operation," pursuant to and as provided for in Article LII of Contract No. 4, "initial operation" as therein defined and the term of the lease therein contained not having as yet commenced, due to the failure of the City of New York to construct Subdivisions I and II of the Broadway-Fourth Avenue Line to a condition susceptible of operation as provided for in Article XVVIII of said contract; that as alleged and admitted in paragraph "SIXTH" of said petition, on and at all times since August 3, 1913, the earnings 3002
of the Existing Railroads and of the parts of the Railroad, as well as of the parts of the extensions and additional tracks, from time to time constructed and placed in operation "have been pooled and the receipts disposed of as provided in said contract; on information and belief that all deficits, which have accrued to the City of New York since the commencement of temporary operation on August 3, 1913, have been added by the City to its cost of construction of the Railroad, pursuant to and as provided for in Article LII of said contract; and that neither the petitioner nor The City of 3003
New York, for whom the petitioner assumes to act herein, is a creditor of defendants herein or of either of them under Contract No. 4 or otherwise, nor has the petitioner or The City of New York, any enforceable claim under said contract or otherwise against the defendants or either of them.

XVI. That the defendant, New York Municipal Railway Corporation, has in all respects contributed toward the cost of construction of the Railroad the sum of $13,500,000 pursuant to and in accordance with the provisions of Article XI of Con-

3004 tract No. 4, and said defendant, in addition to contributing said amount, has contributed the cost of construction of the physical connection between Subdivisions I and II of the Broadway-Fourth Avenue Line, pursuant to and as provided for in said Article XI; that said defendant has constructed and equipped and the defendant, New York Consolidated Railroad Company, has placed in operation extensions of and additional tracks to the Existing Railroads, in accordance with the provisions of said certificates, to the extent they
3005 have respectively been authorized and permitted by the petitioner herein so to do; that said defendant, New York Municipal Railway Corporation, has reconstructed and added to the Existing Railroad so as to adapt them for operation in connection with the Railroad, as provided for in Contract No. 4, with the exception of a comparatively small amount of work remaining to be done and now in progress of completion and which the receiver appointed by this court can cause to be completed prior to the time specified in Article XIII of said Contract No. 4 for the completion thereof; that
3006 the defendants, New York Municipal Railway Corporation and New York Consolidated Railroad Company, have duly accounted to the petitioner herein and through it to The City of New York for all receipts and expenditures for and in connection with construction, the provision of equipment, maintenance and operation under Contract No. 4 and said certificates; have duly filed with the petitioner all vouchers, records and reports required in and by said contract and certificates, and have prior to the execution thereof submitted to the petitioner for its approval and has obtained its approval of agreements, undertakings, leases,

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contracts and contract drawings required in and by Contract No. 4 and said Certificates to be submitted to the petitioner herein for its approval; and that said defendants and each of them have performed each and every provision and requirement of said Contract No. 4 and of said certificates on their parts to be performed, except in so far as they have been prevented from performing the same by reason of the failure or neglect of the petitioner and of The City of New York to perform said contract and certificates on their part.

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XVII. That Contract No. 4 and said certificates in and by their provisions furnish and assure to The City of New York full, complete and adequate protection and remedy for any failure, neglect or refusal of the defendants, New York Municipal Railway Corporation and New York Consolidated Railroad Company, or of either of them, or of the receiver herein of said defendants or either of them, to perform the terms, provisions and conditions of said contract and certificates on their parts respectively to be performed, and in support of this allegation the defendants herein make special reference to Articles VI, XIII, XVI, XVII, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXVII, XXXIX, XL, XLV, XLVI and LXXXV of said Contract No. 4; that as the defendants are advised and verily believe, the intervention of the petitioner herein and the appointment of a co-receiver as prayed for, "in especial recognition of the rights and interests of the City of New York," are not necessary for the protection of the rights and interests of said City under Contract No. 4 and said Certificates, but on the contrary that said contract and certificates in

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and of themselves furnish and assure to said City full, complete and adequate protection of any and all rights and remedies it has or may have against the defendants herein or against any receiver of said defendants under said contract and certificates; and that, as the defendants are advised and verily believe, the appointment of a co-receiver herein, "in special recognition of the rights and interests of The City of New York," and especially in view of the allegations contained in paragraph "ELEVENTH" of said petition, in addition to in-

3011 creasing unnecessarily the expenses of the receivership, will give to said City preferential representation in the receivership as against the defendants herein and their creditors and the holders of their securities, and will jeopardize, if not prevent, unity of control and action necessary to preserve intact the properties and assets of the defendants, and necessary for the operation and management of said properties and assets in such manner as will produce most satisfactory results so that the systems of street surface and rapid transit lines of or controlled by the respective defendants shall be con-

3012 tinued and the public duties obligatory upon the respective defendants shall be in all respects discharged, and so that the properties and assets of the defendants shall be protected and preserved in proper condition and repair and the business of the same shall be secured and developed.

IN CONSIDERATION WHEREOF, the defendants herein pray that said petition of the Public Service Commission for the First District of New York, for permission to intervene herein and

for the appointment of a co-receiver, may be denied and that said petition may be dismissed.

GEORGE D. YEOMANS,
Solicitor for the Defendants,
Brooklyn Rapid Transit Company,
New York Municipal Railway
Corporation and New York
Consolidated Railroad Com-
pany,
Office and Post Office Address,
85 Clinton Street,
Borough of Brooklyn,
City of New York.

State of New York, }
County of Kings, } ss.:

T. S. Williams, being duly sworn, deposes and says that he is an officer, to wit: President of Brooklyn Rapid Transit Company, one of the defendants herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

T. S. WILLIAMS.

Sworn to before me this
15th day of January, 1919.

JOHN A. DONOHUE, JR.,
Notary Public,
(Seal) Kings County.
Kings County Clerk 6, Kings Co. Reg. 103.
New York Co. Clerk 14, N. Y. Co. Reg. 10010.
Queens County Clerk 992.
Commission expires March 30, 1920.

3016

State of New York,
County of Kings, } ss.:

T. S. Williams, being duly sworn, deposes and says that he is an officer, to wit, President of New York Municipal Railway Corporation, one of the defendants herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he
3017 believes it to be true.

T. S. WILLIAMS.

Sworn to before me this
15th day of January, 1919.

JOHN A. DONOHUE, JR.,
Notary Public,
(Seal) Kings County.
Kings County Clerk 6, Kings Co. Reg. 103.
New York Co. Clerk 14, N. Y. Co. Reg. 10010.
Queens County Clerk 992.
3018 Commission expires March 30, 1920.

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State of New York, }
County of Kings, } ss.:

C. D. Meneely, being duly sworn, deposes and says that he is an officer, to wit, Vice-President of New York Consolidated Railroad Company, one of the defendants herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

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C. D. MENEELY.

Sworn to before me this
15th day of January, 1919.

JOHN A. DONOHUE, JR.,
Notary Public,
(Seal) Kings County.
Kings County Clerk 6, Kings Co. Reg. 103.
New York Co. Clerk 14, N. Y. Co. Reg. 10010.
Queens County Clerk 992.
Commission expires March 30, 1920.

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3022 **Government's Exhibit No. 41.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity, E. 15-347. Affidavit of the Corporation Counsel of the City of New York.

County of New York,
Southern District of New York. } ss.:

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3024 William P. Burr, being duly sworn, deposes and says:

That he is the Corporation Counsel of the City of New York. That under the Charter of the City of New York (Section 255) the Corporation Counsel is expressly vested with the power "to institute actions in law or equity, and any proceedings provided by the Code of Civil Procedure or by law in any Court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the City, or any part or portion thereof, or of the peo-

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ple thereof." That he appears on the return day of the order made the 31st of December, 1918, herein for the purpose of applying on behalf of the City of New York for the appointment of a Co-Receiver herein in pursuance of a Resolution of the Board of Estimate of the City of New York, hereinafter more specifically set forth.

Pursuant to the approval of the Board of Estimate of the City of New York, a contract was made under date of March 19, 1913, between The City of New York and the defendant New York Municipal Railway Corporation, which contract is entitled Contract No. 4, and is one of the two contracts for rapid transit construction and operation generally known as the Dual Contracts. Simultaneously with the making of Contract No. 4 there were also issued, with the approval of the Board of Estimate of the City, by the Public Service Commission for the First District, to the said New York Municipal Railway Corporation, two Certificates, also dated March 19, 1913, one authorizing the extension of the existing railroads, owned or controlled by the defendant New York Municipal Railway Corporation and the defendant New York Consolidated Railroad Company, and the other authorizing the laying of additional tracks on the existing railroads, owned or controlled by the said New York Municipal Railway Corporation or the said New York Consolidated Railroad Company.

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Leave is hereby asked to refer upon the hearing of this application, and upon any further proceedings held thereon, to said Contract No. 4 and to said Certificates, with the same force and effect as though they were set forth in full in this affidavit.

Pursuant to said Contract No. 4 a large part of the new rapid transit railroad as projected by said

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contract has been constructed by the City of New York.

There has been appropriated by the City of New York for the construction of said rapid transit railroad the sum of $124,811,928.60, of which sum $110,695,775.95 has already been expended and contract obligations incurred by the City in the further sum of $14,057,270.24. There has been contributed to construction of these subways about $10,000,000 by the New York Municipal Railway Corporation on account of the amount agreed and

3029 required to be contributed by said Company.

The City of New York is holder of unpaid claims and judgments against the New York Consolidated Railroad Company, the Brooklyn Rapid Transit Company and its subsidiary companies on contract obligations, statutory obligations for paving and percentage of gross receipts, and damages to property in the aggregate sum of $7,645,907.79, as more fully appears from the statement of said claims hereto annexed and marked "Exhibit C."

There is further due and unpaid by the subsidiary companies controlled by the Brooklyn Rapid

3030 Transit Company various taxes, viz.: Real Estate of Corporations Taxes, Special Franchise Taxes, and Assessments for improvements in the aggregate of $1,894,457.49, as more fully appears from the statement hereto annexed and marked "Exhibit B."

These claims are exclusive of the claim of the City of New York against the New York Municipal Railway Corporation for $1,990,800 to which reference is hereinafter made.

The aggregate amount of the claims of the City of New York against the defendants and the subsidiary companies of the Brooklyn Rapid Transit Company is $11,531,165.28.

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The financial interest of the City of New York represented by expenditures actually made for the construction of rapid transit railroad under said Contract No. 4 and by its unpaid claims and judgments against these defendants and the subsidiary companies of the Brooklyn Rapid Transit Company is over $136,284,000.

Temporary operation of such railroad, as thus in part constructed, together with the existing railroads, owned or controlled by the said New York Municipal Railway Corporation or the said New York Consolidated Railroad Company, and to which 3032
extensions have been in part built, and upon which additional tracks have been laid in part in pursuance of the aforesaid Certificates, has been begun pursuant to the provisions of Contract No. 4 by the said New York Municipal Railway Corporation, designated in Contract No. 4 as the Lessee, and by the said New York Consolidated Railroad Company, the assignee of said Lessee.

Disputes and controversies have arisen between the City of New York and these two defendant railroad corporations, both in connection with the amount of contribution agreed to be made by the 3033
New York Municipal Railway Corporation to the construction of said new railroad, and, furthermore, in respect of the inadequate and at times even unsafe service rendered by the New York Municipal Railroad Corporation and the New York Consolidated Railroad Company in their aforesaid temporary operation of said railroads, as far as completed.

Under the provisions of Contract No. 4, the City of New York has entered in contractual relations with the New York Municipal Railway Corporation covering various matters connected with the

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construction and operation of the rapid transit railroad system projected under said Contract and Certificates. Included among these contractual provisions is a covenant upon the part of the City in which it agrees that the Lessee under said Contract may institute suits against the City for various matters arising in respect of the Contract, including the right to bring suit at law or in equity in assertion of a claim for a right of specific performance or otherwise (Contract No. 4, Article XV).

3035 Similarly, by the provisions of Contract No. 4, in the event that the Lessee, viz., the New York Municipal Railway Corporation, should fail to contribute toward the cost of construction, or to equip the railroad, as in the Contract provided, the City is given the right to avail itself of various specific remedies, such as through the agency of the Public Service Commission to declare the Lessee in default and to take advantage of that default in the manner specified in the Contract, and, furthermore, by virtue of Article XVI of Contract No. 4, the City

3036 "may avail itself of each and every remedy herein specifically given to the City, or, subject to the foregoing provisions of this Article, now or hereafter existing at law or in equity or by statute, and, subject as aforesaid, each and every such remedy shall be in addition to every other remedy so specifically given or otherwise so existing, and may be exercised from time to time and as often and in such order as may be deemed expedient by the Commission, and the exercise, or the beginning of the exercise of one remedy shall not be deemed a waiver of the right to exercise, at the same

time or thereafter, any other remedy, except that no two inconsistent remedies shall be exercised at the same time."

Furthermore, in the event of a default by the Lessee, viz., the said New York Municipal Railway Corporation, either in paying the rental provided for in Contract No. 4 or in case of the failure or neglect of the said Lessee faithfully to observe, keep and fulfill any of the conditions, obligations and requirements of the lease, it is provided in Article LXXXV of said Contract that the City may 3038
take advantage of that default through the agency of the Public Service Commission in various particulars specified under subdivisions 1, 2 and 3 of said Article, and in addition thereto it is provided in subdivisions 4, 5 and 6 of said Article

"(4) The City may by the Commission or otherwise, but without suit, enforce by sale or otherwise its lien upon any cash, securities, bonds or securities or surety obligations held as aforesaid. Or,

(5) The City may by the Commission or 3039
otherwise also bring any suit or proceeding for injunction or for specific performance or to recover damages or to obtain any relief or for any purpose proper under this contract.

(6) The City may by the Commission or otherwise avail itself of each and every remedy herein specifically given to the City, and, subject to the foregoing provisions of this Article, every remedy herein specifically given or other remedy now or hereafter existing at

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law or in equity or by statute, and, subject as aforesaid, each of such remedies shall be in addition to every other remedy so given or otherwise so existing and may be exercised from time to time and as often and in such order as may be deemed expedient by the Commission, and the exercise, or the beginning of the exercise, of one remedy shall not be deemed a waiver of the right to exercise, at the same time or thereafter, any other remedy, except that no two inconsistent remedies shall be ex-

3041 ercised at the same time."

Moreover, by the terms of Contract No. 4, and within thirty days after the execution of that Contract, the New York Municipal Railway Corporation was required to file with the Comptroller of the City of New York a bond in due form executed by said Lessee and by two or more sureties in the sum of $1,000,000. Said bond was executed by the New York Municipal Railway Corporation substantially in the form set forth as an appendix to Contract No. 4, whereby the said New York Munici-

3042 pal Railway Corporation is held firmly bound, together with its sureties, jointly and severally, unto the City of New York, in the sum of $1,000,000, the condition of said bond being that the Lessee shall promptly pay the amount of the annual rental specified in said Contract and shall also faithfully perform all the covenants, conditions and requirements specified and provided for in said Contract.

The Public Service Commission for the First District of the City of New York is, by law and by the terms of Contract No. 4, designated as a special agency or instrumentality to represent the City and the State in various particulars covering the

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supervision of construction, and the operation of said rapid transit railroad and existing railroads agreed to be operated in conjunction with said railroad. The Public Service Commission has at various times and in various ways, since such Contract No. 4 was entered into, exercised the jurisdiction vested in it under statute, and under this contract, and has issued various orders and directions to the two aforesaid railroad corporations in respect of their temporary operation under Contract No. 4. Many of the orders and directions of the Public Service Commission, as the deponent 3044
is informed and verily believes, have been partially or wholly disobeyed or disregarded by the said corporations.

As deponent is informed and verily believes, it has been claimed on behalf of the Public Service Commission, that the said New York Municipal Railway Corporation is in default under Contract No. 4. The two said railroad corporations, on the other hand, have publicly stated and alleged that the Public Service Commission has hampered and delayed the said railroad companies in respect of their performance of Contract No. 4. 3045

The matters in dispute between the Public Service Commission and the said railroad companies relating to construction, equipment and operation of the aforesaid railroads have been so frequent and plentiful, and have come so gravely to imperil the City's aforesaid investment of many millions of dollars in this enterprise, as well as the safety and convenience of the traveling public, that the City itself by its duly constituted authorities has for over a year past at times found it necessary directly to take up the defense and protection of the interests of the City and of the people of the City

3046 in respect of this Contract, and the public service contemplated to be performed. The City in this way has had occasion to institute suit and proceedings in court and to investigate the conduct of the Public Service Commission, as well as that of these railroad companies, in relation to their respective duties and obligations under Contract No. 4. A claim has been advanced by Counsel to the Public Service Commission that the said Commission has an exclusive right to represent the City in all matters connected with this Contract, including the
3047 City's investment of many millions thereunder. As Corporation Counsel of The City of New York, I am of the opinion that this claim is without substantial merit.

On January 13, 1919, deponent obtained from the Public Service Commission a copy of the petition of the Public Service Commission, verified January 11, 1919, and a notice of motion dated the same date, being papers which the Public Service Commission propose to submit to this Court on the hearing herein for the continuance of the Receivership on January 15, 1919, as a basis for an appli-
3048 cation of said Commission to be permitted to intervene, and be heard or consulted as to the selection of a Co-Receiver, in view of the large interests of The City of New York in the properties sought to be placed in the custody of the Receiver.

Deponent has read that portion of said petition of the Public Service Commission in which the Commission states that it

> "does not desire to be understood as here interposing any objection to the appearance and representation of The City of New York herein * * *."

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Nevertheless by legal argument, said petition intimates that the Public Service Commission have an *exclusive* capacity and right to appear for and represent The City of New York, in respect of rapid transit matters. This legal contention which, in the opinion of deponent, is invalid as aforementioned, was advanced by the defendant, New York Municipal Railway Corporation, in an action now pending in the Supreme Court of the State of New York, before His Honor, Mr. Justice LEHMAN, and as yet undetermined; and the same contention was at the same time advanced before Mr. Justice LEHMAN, sitting in the same court, in another suit instituted by The City of New York against the Chief Engineer of the Public Service Commission and the Interborough Rapid Transit Company as defendants.

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The truth is that under the Constitution and laws of the State of New York, including the Charter of the City of New York, the City has an inherent right by its own local and duly constituted authorities, to at all times enforce, protect and maintain its rights by suit or otherwise, as may be necessary.

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Further referring to the said petition of the Public Service Commission, deponent asks leave upon the hearing herein, to refer to the various other matters alleged in said petition. Deponent does this not for the purpose of adopting the same, or as agreeing therewith necessarily, but merely as setting forth the views and claims, in fact and law, advanced by the Public Service Commission, which vested with various powers and duties both on behalf of the State and in behalf of the City in re-

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spect to the details of regulation and supervision under the laws of the State of New York and by virtue of the terms of Contract No. 4, is the body of Contract No. 4.

There are now pending in the Supreme Court of the State of New York two suits to which the City of New York is a party, which directly involve Contract No. 4:

1. On or about November, 1916, the City of New York as plaintiff, instituted an action in the Su-
3053 preme Court of the State of New York, against the New York Municipal Railway Corporation and the Public Service Commission and others, defendants, to set aside the allowance by the Chief Engineer to the Commission of the sum of $1,990,800 as a charge against the City, which sum had been allowed on the theory that it could be properly included to make up in part the $13,500,000 agreed to be contributed by the New York Municipal Railway Corporation to the construction of the aforesaid railroad and in part had been allowed as properly chargeable up against the City as part of the said
3054 corporation's capital contribution to cost of construction, equipment, etc. Issue was joined in this action, and in February, 1918, the same came to trial before Mr. Justice LEHMAN, at Special Term, Part IV, of the Supreme Court, and said action was finally submitted on behalf of the plaintiff, the City of New York, on or about January 10th, 1919, and is now pending undetermined before said Court.

2. On or about December 10, 1918, an action was instituted in the Supreme Court, State of New York, by the New York Municipal Railway Corporation and the New York Consolidated Railroad

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Company, plaintiffs, against the City of New York, and the Public Service Commission, defendants, in which suit the said two railroad corporations as plaintiffs seek by decree of specific performance to compel the City of New York to complete certain portions of the said railroad projected in said Contract No. 4 which have not as yet been completed and in which suit other relief is prayed for by said corporations. The City of New York has not yet interposed its answer to this suit. Such answer is, however, now in course of preparation by deponent as Corporation Counsel of the City. This action 3056
may directly involve the question of the proper construction or validity of various provisions of Contract No. 4 and also may and ought directly involve a determination of the question whether or not the said two railroad corporations are in default under Contract No. 4. Deponent begs leave to refer upon the hearing herein to the pleadings, papers and proceedings in said State Court actions.

Under the provisions of Contract No. 4, The City of New York in various ways, in the event of a failure or inability upon the part of the New York 3057
Municipal Railway Corporation to perform its obligations under said Contract, is assured the right to take the possession and operation of the aforesaid railroad, and existing railroads to be operated therewith, out of the hands of the said New York Municipal Railway Corporation, grantee and lessee under said Contract, and to operate the same as agent for said lessee or grantee, and in that connection The City of New York is given and assured the right, at its election, itself to take possession and operation of said railroads, or to enter into a

3058 contract with some other person or corporation to so operate the same. For greater certainty deponent begs leave to refer to Contract No. 4 for the provisions conferring this right upon the City.

The above entitled suit in equity of the Westinghouse Electric and Manufacturing Company, plaintiff, against the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company was instituted, and application to this Court for receiver was made, upon the filing of the complaint
3059 and answer by the defendants on December 31, 1918, all without notice to or consultation with The City of New York or any of its officials, and it was only through the newspapers published on January 1, 1919, that deponent and other officials of The City of New York learned of such receivership.

Deponent has since read the complaint and answer herein and the order of this Court appointing Lindley M. Garrison receiver of the defendants. Neither The City of New York nor any of its officials were consulted in respect of the selection or nomination of Mr. Garrison for appointment by
3060 this Court as said receiver.

By reason of the matters herein set forth or referred to, The City of New York has definite contract rights and vital monetary and transportation interests in respect of the question whether the Mr. Garrison or any other individual or individuals should be continued during the pendency of this suit as receiver or receivers of the property of the aforesaid defendant companies, particularly for the reason that the order of this Court of December 31, 1918, appointing said Lindley M. Garrison as temporary receiver aforesaid purports to authorize said receiver:

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"Immediately to take possession of and to run, manage and operate the said properties and assets of the several defendants herein in such manner as will in the judgment of said receiver produce most satisfactory results, so that the operation of the system of street surface and rapid transit lines controlled by the defendant Brooklyn Rapid Transit Company shall be continued and the public duties obligatory upon the respective defendants be in all respects discharged, and to exercise the authority of franchise of the respective defendants and discharge their public duties and preserve and control the properties and assets of said several defendants * * *."

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In addition to the City's interests hereinbefore specified under Contract No. 4, the City and the people of the City, including particularly the people of the Borough of Brooklyn, are vitally interested in regard to the various other elevated and street surface railroad companies which are controlled by stock control or otherwise by the defendant Brooklyn Rapid Transit Company, which is what is known as a "holding company."

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The said company is not itself a railroad corporation, but is merely a business corporation organized under the Business Corporation Law of the State of New York.

There has been increasingly during the past year grave dissatisfaction expressed by the people of the City and by officials of the City itself, as to the control of the public authorities as would be a corporation duly organized as a railroad or public service corporation. In various ways the control

3064 by the defendant Brooklyn Rapid Transit Company of the traction lines which go to make up what is known as its system may have resulted in the furnishing of that inadequate, and, at times, unsafe service to the people of the City, particularly those living in the Borough of Brooklyn, of which complaint has constantly been made as aforesaid.

It is a grave question which the local authorities of The City of New York have had under consideration by reason of the responsibilities devolved upon them by the Constitution and the laws of
3065 the State of New York, as to whether or not the defendant Brooklyn Rapid Transit Company should be aided, either by favorable action upon applications for increases of fare, or by the grant of other measures of relief, in further strengthening or perpetuating the said business corporation's control over this transit system, which it has operated with such poor results and so inadequately, having regard to the welfare and interests of the people of the City. Direct responsibility should be placed on all the Companies actually operating in the streets of the City.

3066 Furthermore, the question whether the New York Municipal Railway Corporation and New York Consolidated Railroad Company may be permitted to continue in possession and operation of the Rapid Transit Railroad and aforesaid Existing Railroads, or should be granted an amendment of the provisions of said Contract, in view of the now admitted financial inability of said company to continue with the performance of its part of said contract, is one which, under the terms of Contract No. 4, rests in the discretion and election of the City of New York and more particularly in the judgment and discretion of the Board of Estimate, as the local legislative body of the City.

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Under the laws of the State of New York and the terms of Contract No. 4, only by an amendment to said contract recommended by the Public Service Commission, and approved by the Board of Estimate and Apportionment, could The City of New York surrender its right (hereinbefore referred to), at any time during the pendency of this suit, to exercise the remedies vested in it under Contract No. 4 in the event of default, including the right to take possession of the aforesaid Rapid Transit Railroad and Existing Railroads out of the hands of the defendant Railway Corporation 3068
or their receiver or receivers appointed by this Court. The responsibility devolves upon the City authorities to decide whether to waive any and all defaults of the said railroad corporations under this contract, and whether to permit the operation of said Railroad and Existing Railroads to be further entrusted to them or their receivers, as lessee or grantee.

The extent of the City's investment in the construction of the Rapid Transit Railroad under Contract No. 4 is set forth in detail in the annexed statement (Exhibit "A") of Duncan MacInnes, 3069
Chief Accountant of the Department of Finance of the City of New York, to deponent dated January 6, 1919.

Besides the moneys already invested by it, the City will have to expend many additional millions of dollars to complete the construction contemplated by Contract No. 4, which will require harmonious action between the City and the Lessee, its receiver or receivers.

The Brooklyn Rapid Transit Company owns or controls the following elevated and street surface

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railroad lines, as defendant is informed by various records and verily believes:

1. *Brooklyn Heights Railroad Co.,* entire capital stock of $200,000 owned by B. R. T.

2. *Brooklyn City Railroad Co.,* leased to Brooklyn Heights Railroad Co. for 999 years from February 14, 1893.

3. *Brooklyn, Queens County and Suburban Railroad Co.,* entire capital stock of $2,000,000 owned by B. R. T.

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4. *Nassau Electric Railroad Co.,* 98 per cent. of entire capital stock owned by B. R. T.

5. *Coney Island and Gravesend Railway Co.,* entire capital stock of $350,000 owned by B. R. T.

6. *Coney Island and Brooklyn Railroad Co.,* $2,637,000 of the $2,983,000 of outstanding capital stock owned by Coney Island and Gravesend Railway Co.

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7. *DeKalb Avenue and North Beach Railroad Company,* entire $10,000, capital stock owned by Coney Island and Brooklyn Railroad Co.

8. *Bridge Operating Company,* $50,000 of $100,000 of capital stock owned by B. R. T.

9. *Transit Development Company,* entire capital stock of $500,000 owned by B. R. T.

10. *South Brooklyn Railway Co.,* entire capital stock of $500,000 owned by B. R. T.

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11. *New York Consolidated Railroad Co.,* over 96 per cent. of outstanding stock owned or controlled by B. R. T.

12. *New York Municipal Railway Corporation,* all outstanding capital stock owned by New York Consolidated Railroad Co.

13. *South Brooklyn Railway Company,* outstanding stock amounting to $500,000 owned by B. R. T.

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14. *Prospect Park and Coney Island Railroad Co.,* leased by South Brooklyn Railway Co. for 999 years from June 7, 1899.

15. *New York and Coney Island Railroad Company,* leased to Prospect Park and Coney Island Railroad Co., $92,500 of the outstanding $100,000 capital stock controlled by B. R. T.

16. *Prospect Park and South Brooklyn Railroad Co.,* leased to Prospect Park and Coney Island Railroad Co., all outstanding capital stock controlled by B. R. T.

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Through its ownership of all or a majority of the capital stocks of said subsidiary companies, the Brooklyn Rapid Transit R. R. Co. (B. R. T.) controls all the elevated lines in the Borough of Brooklyn and all the surface lines, with the exception of a short piece of line operated by the Van Brunt St. Erie Basin R. R. Co. and about ½ mile operated by the Manhattan Bridge 3¢ Fare Line.

In addition to requesting that this Court appoint a Co-Receiver and appoint in such capacity

3076 the Comptroller of the City of New York as recommended by the Resolution of the Board of Estimate, copy of which is hereto annexed, deponent, as Corporation Counsel of the City of New York, hereby begs leave respectfully to submit the following additional suggestion to this Court:

That the Court exact and impose as a term of the said receivership, and as an obligation and stipulation to be accepted and assumed not only by the receiver or receivers herein, but also by the defendant, Brooklyn Rapid Transit Company, as
3077 well as by such subsidiary corporations of the Brooklyn Rapid Transit Company, as to which this receivership may hereafter be extended, that no compulsory free transfer obligations now enforced by virtue of State statute, ordinance, or other valid State authority in respect of the street surface railroad corporations which are controlled by stock control or otherwise by the defendant, Brooklyn Rapid Transit Company, shall be abrogated or suspended merely through the action of said defendant Brooklyn Rapid Transit Company, or said receiver or receivers, in endeavoring to abrogate
3078 leases or other so-called unprofitable contracts, or merely by voluntary action of any of the parties to said leases in termination of the same. By the aforesaid compulsory free transfer obligations, deponent refers to those privileges which are now existing and which enure in favor of the traveling public, enabling them to take a single continuous ride for a five cent fare over various lines of the Brooklyn Rapid Transit System, including those compulsory free transfers now in force by virtue of provisions of State law which were assumed when leases or trackage contracts were made by the aforesaid corporations or any of them or by virtue

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of contracts with the City when franchises were granted. And deponent includes herein and refers particularly to the compulsory free transfer privileges now existing and enuring in favor of passengers arising from the lease made on or about February 4, 1893, for a term of 999 years, by the Brooklyn City Railroad Company to the Brooklyn Heights Railroad Company, both of which companies are controlled by stock control or otherwise by defendant, Brooklyn Rapid Transit Company.

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Deponent does not suggest on behalf of the City that this lease, as it now stands, must necessarily be continued, but on the contrary, it is probable that its various terms, including particularly its high rental provisions, ought to be modified. Deponent respectfully submits, however, that whether or not such lease be further continued or modified, that the existing compulsory free transfers in favor of passengers should be continued, except and until the Public Service Commission under the powers vested in it under existing State law, or else the Legislature itself, may otherwise prescribe or provide. In this connection deponent respectfully refers to Section 65 of the Judicial Code of the United States, which provides:

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> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession there

3082 of. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both."

This provision of the Judicial Code, which is a valid enactment of Congress and, therefore, represents the supreme law of the land, has been construed by the Supreme Court of the United States to enjoin upon a receiver or receivers appointed by the Federal Court in their management and
3083 operation of a State railroad property, the due observance not only of statutes of the State, but also of ordinances of local authorities (see *Erb* vs. *Morasch*, 177 U. S., page 584; *U. S.* vs. *Harris*, 177 U. S., page 305). And deponent, as Corporation Counsel of the City of New York, respectfully gives notice that as representing the people of the City of New York, he proposes to hold the receiver or receivers appointed herein to a strict compliance with this Act of Congress, in its application to any matters relating to the attempted abrogation of free transfer privileges or any other matter re-
3084 lating to an attempted raising or changing of the rates of the fares which the said street surface railroad companies, controlled by the Brooklyn Rapid Transit Company, may justly charge under State law. Deponent similarly invokes this Act of Congress in its application to any other laws of the State of New York or ordinances of the duly constituted authorities of the City of New York pertaining to the proper operation and management of the various railroad companies, stock-controlled by the Brooklyn Rapid Transit Company.

Referring to the application being made by the Public Service Commission for the First District

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upon this hearing, deponent as Corporation Counsel of the City submits to this Court the following further suggestion:

Deponent expresses no opinion as to the legal merit or as to the wisdom or propriety of so much of the application of the Public Service Commission for the First District as prays for leave to intervene as a party to this suit. In so far, however, as the Public Service Commission for the First District asks this Court for leave to suggest or nominate a co-Receiver herein, deponent calls the attention of the Court to Section 2, subdivision 7, of the Public Service Commissions Law, which provides:

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> "7. The term 'street railroad corporation,' when used in this chapter, includes every corporation, company association, joint-stock association, partnership and person, their lessees, trustees or *receivers appointed by any court whatsoever*, owning, operating or managing any street railroad or any cars or other equipment used thereon or in connection therewith."

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Since this provision of the statute creating the Public Service Commission and defining its duties, prescribes that its delegated regulatory and supervisory powers and functions shall extend over a receiver appointed by any court (including thereby this Court), quite as fully as over those railroad corporations themselves, deponent respectfully submits that the appointment of a co-Receiver at the suggestion or nomination of, and in any sense as the representative of, the Public Service Commission would be impracticable and improper, since

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it would result in placing the Public Service Commission in an inconsistent position, viz., it would be (a) the public tribunal regulating public service corporations, and (b) indirectly through the co-Receiver that would be nominated by it as aforesaid, in a measure also one of the "street corporations" to be so regulated.

Deponent respectfully submits that by the appointment of a co-Receiver by this Court upon the request and pursuant to the recommendation of the Board of Estimate of the City of New York, this
3089 Court would lay a foundation for a proper and helpful co-operation between the various public authorities of the City of New York and the receivers appointed by this Court in meeting the vital and important problems that will arise in respect of these companies and that are pressing for a solution. This Court, by appointing the co-Receiver recommended by the City, will be taking the step which, in deponent's judgment, will best safeguard against, and prevent, this receivership from being availed of merely by special classes of security holders or creditors, so as to enable them to gain un-
3090 due advantage, through the receivership, for their special property interests, to the real detriment of the public interest. In this way this Court will be observing the maxim laid down by the Supreme Court of the United States in *Joy* vs. *St. Louis*, 138 U. S., 1. 47. where, speaking by Mr. Justice BLATCHFORD, the Court said:

> "Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court."

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Deponent, as Corporation Counsel of the City, in submitting said request and suggestion of the Board of Estimate of the City in respect of the appointment of a co-Receiver, earnestly and respectfully submits that his Court, by acting favorably upon the Board of Estimate's suggestion and request, will pursue a course that will be best calculated to avoid conflict between the various railroad corporations and public officials who are charged with duties and responsibilities or else represent important property interests, in relation to the continued operation and control of the rail- 3092
roads of the City of New York comprehended in the Brooklyn Rapid Transit system, involved directly or indirectly in this suit; and it is the judgment and earnest belief of deponent that this Court, by acting favorably upon this request and suggestion of the Board of Estimate, will be afforded the opportunity to enforce a principle and take a forward-looking step that, more than anything else, will be apt to make for the just and speedy solution of the intolerable transit situation that now confronts the people of the City of New York.

The Public Service Commission is but an agent 3093
or an instrumentality in carrying on the work of construction of the Rapid Transit System. The owners of this Rapid Transit System of railroads are the people of The City of New York who have contributed the vast sums expended in their construction. This is the people's money. This is the people's property. The Mayor and the Board of Estimate represent the people and are responsible to them. Not only that, but the Mayor and the Board of Estimate represent the City, which is the grantor of the franchises heretofore granted to street surface railroads controlled, owned and

3094 operated by the Brooklyn Rapid Transit Company and to whom the obligations, conditions and payments under said franchises are due.

The City therefore is not only the owners of the subways in question, but is the largest creditor of these defendants. I annex hereto, marked "Exhibit D," copy of the Resolution of the Board of Estimate duly adopted the 15th day of January, 1919; and further, I am instructed to say that if the Comptroller is appointed by the Court as such co-Receiver, he will serve without compensation.

3095 WILLIAM P. BURR.

Sworn to before me this
15th day of January, 1919.

MATTHEW F. DUFFY,
Notary Public,
Kings Co., No. 138.
Kings Co. Register's No. 9030; New York Co. Clerk's No. 61.
New York Co. Register's No. 9060; Bronx Co. Clerk's No. 4.
3096 Bronx Co. Register's No. 906; Queens Co. Clerk's No. 1201.
Term expires March 30, 1919.

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Exhibit A.

THE CITY OF NEW YORK.

DEPARTMENT OF FINANCE.

COMPTROLLER'S OFFICE.

January 6, 1919.

3098

Memorandum for Corporation Counsel

in the Matter of

City's Investment in Rapid Transit Construction under Contract No. 4.

* * *

Contract No. 4 is that contract for which $60,000,000 was appropriated by the Board of Estimate and Apportionment on March 18, 1913, to provide the City's obligation for the construction of rapid transit railroads which are to be operated by the New York Municipal Railway Corporation, a corporation created by the Brooklyn Rapid Transit Company as a subsidiary corporation, for the purpose of operating the rapid transit railroads and the elevated railroads to be connected therewith.

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* * *

Up to March 18, 1913, the City of New York had provided funds for the construction of the BROOKLYN CENTRE STREET LOOP LINES and the FOURTH AVENUE SUBWAY, aggregating $40,501,991.00

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These divisions or lines of the rapid transit railroad were included with the system of rapid transit railroads to be constructed by the City and to be operated by the New York Municipal Railway Corporation under Contract No. 4.

To this $40,501,991, the City, by the Board of Estimate and Apportionment, appropriated on March 18, 1913, an additional amount of 60,000,000.00

3101 to be provided by issue of corporate stock.

This gave a grand aggregate of $100,501,991.00 which the City was to contribute towards the construction of the railroads to be operated under Contract No. 4 and to which construction the New York Municipal Railway Corporation was to contribute $13,500,000.00.

Since March 18, 1913, the City

3102 has appropriated additional funds for the construction of the railroads under Contract No. 4, amounting to 24,309,937.60

thus making a grand aggregate of $124,811,928.60

which the City of New York has already provided for the construction of the rapid transit railroads to be operated and being operated (after a fashion) by the New York Municipal Railway Corporation

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under rapid transit contract No. 4, these railroads forming a part of the so-called Dual System of Rapid Transit Railroads, which is not a dual system at all, because these lines do not link with the system under operation and to be operated by Interborough Rapid Transit Company either under Contracts 1, 2 or 3. Consequently, there are two separate systems of rapid transit railroads within the Greater City, both of them separate and apart, and they therefore do not provide a Dual System, except in name.

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The $124,811,928.60 already provided for by the City and which will later on require to be supplemented by many millions of dollars more before the system is totally constructed, has been applied to the following general purposes, all of which classify under and form a part of the cost of construction as defined by the provisions of the contract, viz.:

For CONSTRUCTION, which includes construction of the railroads and the various stations; station finish; erection of signal towers; purchase and installation of tracks and track materials, and all of the outlays which come within the construction costs under the provisions of the contract	$97,930,392.13
For ACQUIREMENT OF REAL ESTATE required for the construction of the lines	8,006,579.36
For INTEREST ON BONDS ...	17,354,957.11

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For that part of the ENGINEERING and OTHER EXPENSES of the PUBLIC SERVICE COMMISSION from March 18, 1913, to December 31, 1914, which is included in and formed a part of the cost of construction	1,520,000.00
TOTAL PROVIDED by the City up to December 31, 1918, towards the cost of Construction of the Rapid Transit Railroads under	
3107 Contract No. 4	$124,811,928.60

It may be noted from the foregoing that that part of the expenses of the Public Service Commission of the past four years, which is chargeable as cost of construction, viz., from January 1, 1915, to December 31, 1918, has not been included in the preceding statement of the City's Investment for rapid transit construction under Contract No. 4. The total amount of such expenses which form a
3108 part of the cost of construction under Contracts 3 and 4 aggregates $10,500,000, and the division of this amount between Contracts 3 and 4 will be fully 50 per cent. to the latter. These expenses of the Commission have been paid by the City from special revenue bond issues which will be converted into and taken up by rapid transit corporate stock.

The obligation of the New York Municipal Railway Corporation was to contribute $13,500,000 towards the cost of construction and also to contribute the cost of making the physical connection at

Canal Street and Broadway of the Centre Street Loop Line with the Broadway-Fourth Avenue Line. This additional outlay by the Company has aggregated $670,000.

From the $13,500,000 the Company has paid to the City the following sums which were applied to the purposes stated:

For Cost of Awards for Real Estate payable by the City	$4,422,035.69	
For Interest on City's rapid transit corporate stock, applied to the purposes of Contract No. 4.....	660,472.92	3110
The Company has also made the following outlays from the $13,500,000, as per statement furnished by the Public Service Commission in 1914:		
For Debt Discount, which reflects payment on account of the total debt discount of $405,000 to which the Company is entitled on the $13,500,000 to be provided by it towards the cost of construction	172,108.70	3111
For Interest on its subway construction bonds, which reflects a payment on account of the total interest on bonds during construction which will ultimately become a part of the $13,500,000 of the Company's contribution.	923,842.02	
For Legal expenditures	7,505.22	
For Engineering and Superintendence	38,006.74	

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For Miscellaneous Construction expenditures	133,140.63
For Sundry extra Construction Work on the Centre Street Loop Lines done at cost by the New York Municipal Railway Corporation prior to the beginning of operation of these lines in August, 1913, as per statement of the Public Service Commission.	85,350.97
3113 Amounts paid to Jacobs & Davies under contracts, at cost plus profit, for certain connections at the 38th Street Cut, Brooklyn, and of the Centre Street Loop Lines, Brooklyn Bridge to Williamsburg Bridge (estimated)..	3,500,000.00
For deed, dated December 30, 1913, conveying easements between Fourth and Tenth Avenues, Brooklyn, to City of New York (as per provisions of Contract No. 4) the Company is allowed	1,000,000.00
3114	
TOTAL OUTLAYS (as estimated) by the COMPANY from its contribution of $13,500,000	$10,942,462.89
Balance of New York Municipal Railway Corporation's contribution under Contract 4	2,557,537.11
	$13,500,000.00

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From the balance of approximately $2,557,000, the interest on the Company's outlay during construction will require to be paid, together with its engineering costs chargeable to construction, and the balance of the debt discount.

The amount thus indicated (xx), namely, $3,500,000, is the nearest estimate which I have of the cost and is probably within the amount which will be charged by the New York Municipal Railway Corporation as a part of the cost of construction expended under the agreement which it has apparently made with Jacobs & Davies for 3116
the work indicated.

The Company, in addition to contributing $13,500,000 towards the cost of construction of the rapid transit railroads, has also to provide for the equipping of these railroads and in addition to extending and constructing additional tracks to certain of its lines, so shall reconstruct and so add to the existing railroads as to adapt them in all respects for operation in conection with the railroad, as more particularly provided in Article XIII of Contract No. 4.

The estimate, so far as I can learn, of the equip- 3117
ment cost is that it may reach $15,000,000 and the extending and constructing of additional tracks and the reconstructing of existing railroads may altogether aggregate $36,500,000 which, with the contribution of $13,500,000 towards the cost of construction, will make the Company's outlays approximate $65,000,000.

DUNCAN MacINNES,
Chief Accountant.

STATEMENT

OF UNPAID SPECIAL FRANCHISE TAXES, "REAL ESTATE OF CORPORATIONS" TAXES, AND ASSESSMENTS FOR IMPROVEMENTS IMPOSED AGAINST THE COMPANIES CONTROLLED BY THE BROOKLYN RAPID TRANSIT COMPANY.

SPECIAL FRANCHISE TAXES.

Company	Year	Borough	Tax Unpaid	Total
Brooklyn Heights	1917	Brooklyn	$1,108.29	
R. R. Co.	1918	"	1,383.35	$2,491.64
Brooklyn City	1901	Queens	38,195.95	
R. R. Co.	1902	"	29,362.07	
	1903	"	17,832.51	
	1904	"	18,500.88	
	1905	"	18,191.79	
	1906	"	25,164.43	
	1916	Brooklyn	28,498.85	
	1917	Queens	1,207.21	
	"	Brooklyn	66,437.28	
	1918	Queens	31,851.76	416,629.10
	"	Brooklyn	141,386.37	
Brooklyn, Queens	1901	Queens	11,290.07	
Co. & Sub. R. R.	1902	"	3,448.24	
Co.	1903	"	2,138.13	
	1904	"	2,088.37	
	1905	"	1,917.04	
	1906	"	2,535.91	
	1907	"	2,408.38	
	1908	"	3,935.93	
	1916	"	6,921.31	
	"	Brooklyn	16,265.32	
	1917	Queens	12,656.70	
	"	Brooklyn	25,895.39	
	1918	Queens	21,770.73	
	"	Brooklyn	47,248.46	160,519.98

Company	Year	Borough	Tax Unpaid	Total
Coney Island & Brooklyn R. R. Co.	1916	Brooklyn	8,230.67	
	1917	Queens	1,798.45	
	"	Brooklyn	3,739.99	
	1918	Queens	2,681.12	
	"	Brooklyn	34,675.30	51,125.
Coney Island & Gravesend R. R. Co.	1902	Brooklyn	2,702.07	
	1903	"	1,029.78	
	1904	"	1,010.55	
	1917	"	120.00	
	1918	"	2,988.41	7,850.
Nassau Electric R. R. Co.	1907	Brooklyn	102,661.60	
	1908	"	.71	
	1909	"	.06	
	1911	"	133.95	
	1916	"	8,589.44	
	1917	"	62,384.21	
	1918	"	124,071.09	297,841.
DeKalb Ave & North Beach R. R. Co.	1917	Queens	670.06	
	1918	"	1,179.69	1,849.
New York Consolidated R. R. Co.	1916	Brooklyn	60,431.34	
	1917	Queens	3,552.78	
	1918	"	6,005.72	
	"	Brooklyn	214,677.84	284,667.
New York Municipal Rys. Co.	1917	Queens	4,750.25	
	"	"	3,267.81	
	1918	"	101,067.68	
	"	"	29,483.01	138,568.
South Brooklyn Ry. Co.	1917	Brooklyn	186.02	
	1918	"	303.11	489.

Company	Year	Borough	Tax Unpaid	Total
Prospect Park & Coney Island R. R Co.	1917	Brooklyn	640.45	
	1918	"	1,058.83	1,699.28

Total Unpaid Special Franchise Taxes.....$1,363,732.71

"REAL ESTATE OF CORPORATIONS" TAXES.

Company	Year	Borough	Tax Unpaid	Total
Brooklyn Heights R. R. Co.	1918	Brooklyn	606.00	606.00
Brooklyn City R. R. Co.	1893	Brooklyn	49.54	
	1896	"	4,275.03	
	1918	Queens	3,319.77	
	"	Brooklyn	2,588.40	10,232.74
Brooklyn, Queens & Sub. R. R. Co.	1904	Queens	1,709.55	
	"	Brooklyn	926.91	
	1905	Queens	2,779.71	
	"	Brooklyn	1,002.29	
	1906	Queens	2,956.42	
	"	Brooklyn	900.38	
Brooklyn, Queens & Sub. R. R. Co.	1907	Queens	3,719.18	
	"	Brooklyn	960.33	
	1908	Queens	3,724.60	
	"	Brooklyn	1,048.66	
	1909	Queens	4,562.61	
	"	Brooklyn	1,566.19	
	1910	Queens	5,289.18	
	"	Brooklyn	1,487.43	
	1911	Queens	15,202.98	
	"	Brooklyn	2,385.49	

Company	Year	Borough	Tax Unpaid	Total
	1912	Queens	16,078.72	
	"	Brooklyn	2,691.60	
	1913	Queens	15,996.44	
	"	Brooklyn	2,566.62	
	1914	Queens	15,374.13	
	"	Brooklyn	2,424.66	
	1915	Queens	16,269.03	
	"	Brooklyn	2,235.97	
	1916	Queens	17,563.57	
	"	Brooklyn	3,324.95	
	1917	Queens	17,748.48	
	"	Brooklyn	3,314.30	
	1918	Queens	24,350.94	
	"	Brooklyn	5,383.20	195,544.52
Coney Island & Brooklyn R. R. Co.	1900	Brooklyn	60.34	
	1901	"	62.10	
	1902	"	61.19	
	1903	"	1,712.86	
	1904	"	3,775.10	
	1905	"	3,750.33	
	1906	"	4,459.30	
	1907	"	4,413.58	
	1908	"	4,843.60	
	1909	"	6,082.30	
	1910	"	10,889.94	
	1911	"	11,407.63	
	1912	"	13,090.00	
	1913	"	13,412.50	
	1918	"	191.40	78,212.17
Nassau Electric R. R. Co.	1895	"	972.17	
	1896	"	5,730.25	
	1918	"	10,445.40	17,147.82

Company	Year	Borough	Tax Unpaid	Total
New York Consolidated R. R. Co.	1918	Queens	26.51	
	"	Brooklyn	96,507.60	96,534.11
New York Municipal Rys. Co.	1918	Queens	7,501.12	
	"	Brooklyn	35,772.00	43,273.12
South Brooklyn Ry. Co.	1918	Brooklyn	12,135.00	12,135.00
Prospect Park & Coney Island R. R. Co.	1892	Brooklyn	124.20	
	1894	"	136.87	
	1895	"	509.42	
	1896	"	500.33	
	1897	"	235.72	
	1918	"	26.40	1,532.94
Prospect Park & Coney R. R. Co.—South Brooklyn Ry. Co., Lessee	1918	Brooklyn	31,413.37	31,413.37

Total Unpaid "Real Estate of Corporations" Taxes.....$486,631.79

ASSESSMENTS FOR IMPROVEMENTS.

Company	Year	Borough	Improvement	Amount unpaid	Total
Brooklyn Heights R. R. Co.	1902	Brooklyn	Nostrand ave. paving	$729.75	
	1900	"	Gates ave. paving	2,731.43	
	1899	Brooklyn	Court Street	1,710.62	
	"	"	Willoughby St. paving	2,036.60	
	"	"	Joralemon St. paving	787.65	

Company	Year	Borough	Improvement	Amount unpaid	Total
	1897	"	Manhattan ave. paving	1,262.77	
	"	"	Greene ave. paving	1,989.94	
	"	"	Greene ave. paving	1,297.38	
	"	"	Greene ave. paving	3,304.39	
	"	"	Gates ave. paving	1,511.65	$17,362.18
Brooklyn City R. R. Co.	1914	"	16th avenue paving	187.78	
	"	"	Kingston avenue paving	106.44	
	"	"	Malbone street paving	537.38	
	1910	"	Fifth avenue paving	39.49	
	"	"	Halsey street paving	806.78	
	1911	"	57th street paving	1,788.69	
	1910	"	Bay Ridge ave. paving	1,960.40	
	1897	"	Driggs avenue paving	1,295.34	
	1913	"	13th ave. paving	22.93	
	1917	"	59th street paving	34.20	
	1914	"	16th avenue paving	1,989.62	
	"	"	Bay Ridge ave. paving	6,010.00	14,779.05

Company	Year	Borough	Improvement	Amount unpaid	Total
Brooklyn, Queens Co. & Sub. R. R. Co.	1913	"	Metropolitan av. paving	611.00	611.00
Nassau Electric R. R. Co.	1915	"	86th street paving	3,972.35	
	1914	"	New Lotts ave. paving	3,923.17	
	"	"	Church avenue paving	736.91	
	1913	"	Church avenue paving	816.89	
	"	"	Church avenue paving	17.38	
	"	"	67th street paving	.95	
	1912	"	Gravesend ave. paving	3.12	
	1899	"	15th street paving	1,265.62	
	1897	"	South 9th st. paving	604.37	11,340.76

TOTAL UNPAID ASSESSMENTS FOR IMPROVEMENTS	$44,092.99
TOTAL UNPAID SPECIAL FRANCHISE TAXES	$1,363,732.71
TOTAL UNPAID "REAL ESTATE OF CORPORATIONS" TAXES .	486,631.79
TOTAL UNPAID ASSESSMENTS FOR IMPROVEMENTS	44,092.99
GRAND TOTAL	$1,894,457.49

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This statement does not include any items of unpaid taxes or assessments for improvements upon lots and buildings owned by the companies controlled by the Brooklyn Rapid Transit System, as any such real property is assessed, not in the name of the owner, but by lot, block and section numbers in the respective boroughs, and without information as to such numbers the amounts of taxes and assessments for improvements imposed thereon cannot be ascertained; nor does the statement include any items of unpaid taxes on personal property, which if they exist would appear upon the 3140
records of the Bureau for the Collection of Personal Taxes.

Exhibit C.

UNPAID CLAIMS AND JUDGMENTS AGAINST THE NEW YORK MUNICIPAL RAILWAY CORPORATION, THE NEW YORK CONSOLIDATED RAILROAD COMPANY AND SUBSIDIARY COMPANIES OF THE BROOKLYN RAPID TRANSIT COMPANY. 3141

THE NEW YORK MUNICIPAL RAILWAY CORPORATION.

The City of New York has a claim now in litigation against this corporation for the sum of $1,990,800, being the amount of a so-called interest allowance made by the Chief Engineer of the Public Service Commission under Contract No. 4 to the cor-

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poration in the prior determination of the cost of construction of the railroad. The City claims that this allowance was unauthorized by the contract and should be stricken out of the account.

This is one of the litigations referred to in the affidavit of the Corporation Counsel.

NEW YORK CONSOLIDATED RAILROAD COMPANY.

	Claims for damage to City property	$27.27
3143	Claim for tolls over Brooklyn Bridge	12,304.20
		$12,331.47

BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD CO.

	Claim for percentage of gross receipts under the Railroad Law (Disputed)	$829,578.89
3144	Claims for paving within the Railroad Area of which amount a claim for $68,739.82 has been reduced to judgment	86,863.79
	Claim for tolls over Williamsburgh Bridge	1,032.40
		$917,474.08

BROOKLYN HEIGHTS RAILROAD COMPANY.		
Claims for tolls over Brooklyn Bridge	$2,208.20	
Claim for percentage of gross receipts under the Railroad Law (Disputed)	6,534,296.50	
Claim for tolls over Williamsburgh Bridge	927.90	
Claims for paving within the railroad area, aggregating $16,627.17, of which claims $1,039.69 has been reduced to judgment	16,627.17	3146
Claims for damages to City property	1,088.91	
	$6,555,148.68	
NASSAU ELECTRIC RAILROAD COMPANY.		
Claim for rent of siding in Washington Street, Brooklyn	$250.00	
Claims for paving within the railroad area, aggregating the sum of	4,025.69	
Claims for damages to City property	721.12	3147
Claims for tolls over Brooklyn Bridge	597.30	
	$5,594.11	
CONEY ISLAND AND BROOKLYN RAILROAD.		
Claim for tolls over Brooklyn Bridge	$745.70	
Claims for paving within the railroad area, aggregating	995.53	
Claim for tolls over Williamsburgh Bridge	297.00	
	$2,038.23	

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CONEY ISLAND AND GRAVESEND RAILROAD.	
Claims for paving within the railroad area, aggregating	$20.38
	$20.38
BRIDGE OPERATING COMPANY.	
Claim for repairing and replacing tracks and electrical equipment on Williamsburgh Bridge	$150,000.00
Claim for tolls over Brooklyn Bridge	733.60
Claim for rental of terminal facilities	2,500.00
	$153,233.60
BROOKLYN RAPID TRANSIT COMPANY.	
Claim for damages to City property	$67.24
	$67.24
Total amount of unpaid claims and judgments	$9,636,707.79

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Exhibit D.

Whereas, the people of The City of New York have invested in the construction of the Rapid Transit Subway Railroads provided by Contract No. 4 between the City and the New York Municipal Railway Corporation the sum of over $124,000,000; and

Whereas, there are now existing claims by the City against the Brooklyn Rapid Transit Company and its subsidiary companies for unpaid paving charges, percentages, car license fees, taxes, etc., amounting to over $11,000,000; and 3151

Whereas, an action has been brought by the Westinghouse Electric and Manufacturing Company in the United States District Court, Southern District of New York, against the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company to recover about $40,000, and 3152
the said companies have admitted their inability to pay said claim; and

Whereas, in said action and under the said admission and with the consent and approval of defendants in said action, on the 31st day of December, 1918, Lindley M. Garrison was appointed receiver of the property of said Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation and the New York Consolidated Railroad Company and is now in actual possession of the property owned by the City of New York representing an expenditure of over $124,000,000 of the 3153
people's money, including said Rapid Transit Subway properties operated or to be operated by said Municipal Railway Corporation or its assignee, the New York Consolidated Company, under said Contract No. 4, by an order duly made and entered on that day by Judge Julius M. Mayer, of the United States District Court, Southern District of New York: and

Whereas, it is of the utmost importance that the rights of the City, its taxpayers and its people should be protected and secured to the utmost advantage during said receivership, in view of the vast

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sums of money now invested in said properties by the people or due by said companies to The City of New York, it is therefore

Resolved, that the Corporation Counsel be and he hereby is instructed to appear on the return day of said order appointing the said Lindley M. Garrison as such receiver, to wit, January 15th, 1919, and for and in the name of The City of New York then and there to ask for the appointment of the Comptroller, Charles L. Craig, the chief financial officer of The City of New York, as co-receiver in
3155 the said suit now pending in the said United States District Court.

Government's Exhibit 42—Opinion of Mayer, J., Making Receivership Permanent and Denying Motion for a Co-Receiver.

The Court: It is my habit, gentlemen, to endeavor to listen carefully to full argument and then when I have made up my mind to announce that
3156 conclusion as promptly as possible. A decision from the bench has the disadvantage, perhaps, of an occasional inapt use of language, but it has the advantage of at times a more comprehensive and intimate statement than might be possible in a written opinion where the subject matter is largely addressed to the discretion of the Court.

As far as I can gather from what all the counsel have stated, both those who represent some financial aspect of the situation, as well as the attorney, Mr. Erbe, who appeared on his own behalf as a stockholder, there is no objection in any quarter to the

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continuance of the receivership; and as I understood the arguments, their trend inevitably leads to the conclusion that in the interests of all concerned such continuance must be had. Therefore, in so far as the order to show cause is addressed to that subject matter, an order will be made continuing the receivership pending this litigation.

In respect of the questions of intervention, intervention is permissible under equity rule No. 37. Whether or not an order shall be made allowing intervention within the purview of that rule is a matter which requires careful consideration, but 3158
one formal application has been made this morning and upon that point I will consider the subject and in due course determine what shall be done. There is no time limit to be placed upon any application for intervention. Such an application may be made at any time pending the litigation; but it would conduce to the orderly administration of this estate if all those who desire to move for intervention would move with reasonable promptness after they shall have made up their minds as to the course they wish to pursue so that all concerned, including the Court, may know within a 3159
reasonably short time who are made parties to the litigation, and may likewise know the extent or limit of any order which the Court may file in that regard. I therefore hope that by the 3d day of February, 1919, which I believe is on a Monday, that all persons desiring to intervene will move accordingly, although it is to be distinctly understood that any person or group of persons who does not move by that date has the absolute right to move at any time during the pendency of the litigation, and I will hold in reserve as I look at it now, with the right, of course, to change my mind,

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the application made on behalf of the Public Service Commission in that regard.

In the conduct of quite a number of receiverships I have always required that notice be given to any responsible person or group of persons who are in one form or another interested in the litigation, whether their interest is of a character which comes within the equity rule to which I have referred, or not. The files of this Court will show that such has been the proceeding before me as well as before the other judges in the Court in a very

3161 considerable number of receiverships, and of course the receiver will be instructed in respect of any applications to the Court, to notify the various representatives of committees and of the public bodies which have appeared here today. The Receiver and the Court will naturally be anxious to obtain from any of these creditors and public bodies any information or suggestion or advice which ultimately will go to the solution of the problems here involved. And meanwhile, as to the conduct of the Receiver, no one need to have any fear that there will be any step taken in this receivership so far

3162 as the Receiver and the Court here are concerned which will not be fully known and fully understood. I do not mean by that that it will be possible for the Receiver and the Court to consult with every person in regard to every small detail of daily operation, and for that matter I do not expect that any person of sufficient understanding and judgment to be worthy to be a receiver in this Court will be called upon to consult the Court as to what might be called the day by day ordinary conduct of the business of these corporations. The Receiver was appointed, among other things, upon the theory that he would know, as any person at the head of

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an important transportation system ought to know, how to deal with the work-a-day problems that are presented in the operation and conduct of a transit system of this character. But anything that is in any sense substantial, which in any true sense affects not merely the operation of this important system as a system, but affects in a true sense the safety and comfort and the interest of the public at large, anything that is contemplated in such directions will be so thoroughly known and so thoroughly understood that no one can by any manner of means misapprehend that it is the purpose of 3164
the Court and its arm, the Receiver, to conduct this receivership in such manner as to make at least the people of the City a moral partner in the conduct of this receivership.

I think the time is here to depart a little bit from the narrow area of the determination of a motion, because this receivership has very important administrative requirements. Generally speaking, those not skilled in the law do not fully understand what a receivership is and what it means, and those of us who are either at the bar or on the bench are apt to take for granted a considerable 3165
amount of knowledge of those things which we must know professionally, and which, perhaps, others not trained in our profession are not so familiar with. It is very important at the outset of this receivership that there be neither misunderstanding nor misapprehension. The situation of this company may be said to have two general heads: What may be called the physical situation and what may be called the financial situation. In respect of the physical situation we have first the actual physical condition of these properties that are in the charge of the Court. Very shortly after

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the present Receiver was appointed he conferred with the Court and he was instructed by the Court as one of the preliminary steps to endeavor to ascertain the physical condition of the transit system so far as that transit system is under this receivership. I found that the Receiver was highly sympathetic with the Court's view. It is my desire that a complete physical survey shall be made of this system. In view of the fact that a deplorable accident has occurred, it is important that every reasonable and humanly possible effort shall be
3167 taken that no such thing as that can occur upon this system again, while in any event this system is under the charge of this Court. Obviously, where the blame lies for the accident is a matter for judicial determination in other tribunals, so far as fixing the legal liablity is concerned in certain particulars. But at once the Receiver will make every effort to have this physical condition known so that all that can possibly be done with the funds at hand and with funds that it is necessary to be obtained shall be done to make this whole system safe for the carriage of the large numbers of our
3168 inhabitants and our visitors who are carried upon this system daily.

Desiring to avoid, if possible, any greater burden of expense upon those different companies than was necessary to incur, I have asked the Receiver to request the Public Service Commission, and I understand he has so done, to assist him by having their expert man make this physical survey. That request thus made, as I understand, or in any event, to be made, was in a spirit of cooperation.

Utterly irrespective of whatever view may be held by contending parties as to one public body or another, this body is a body charged with certain

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duties under the law and so far as this Receiver and this Court is concerned, we both look to this body for cooperation, within those duties that it is called upon to perform; and it is our purpose to deal with the Public Service Commission so far as the Court is concerned—and when I say the Court necessarily I speak for the Court's arm as Receiver—it is our purpose to deal with the Public Service Commission, not at arm's length, not with technical resistance, but in a cooperative spirit, desiring wherever possible to observe any requirements that in good judgment and in fair conclu- 3170
sion they deem proper, after an appropriate inquiry to safeguard the lives and comfort of the traveling public in this city. The Public Service Commission will find upon the part of this Receiver no effort technically to avoid whatever may be the proper and just efforts on the part of the Public Service Commission, designed, as I have repeatedly said, for the proper operation of this railroad from the standpoint of safety.

There is a second consideration under that general head. It must be the effort of the Receiver to, if possible, to attract the good will of those who 3171
are daily traveling upon this railroad. It is said—and I make no comment one way or the other—that there is a lack of kindly attitude on the part of the traveling public who use this system towards this road. If that be so, it is the duty unquestionably the purpose of the Receiver, as is well evidenced by his report, which he has gathered in the short time with commendable care—it is his effort, and must be his effort and his duty to so conduct this railroad as to endeavor to give to the people traveling over it a service which they shall regard as reasonable and fair.

3172 Of course the result cannot be accomplished at once, because an ideal service will require doubtless a great deal yet to be done, and will require possibly more money than is now at hand. But I think if it is understood that the Receiver and the Court approach the problem from the point of view indicated, that any reasonable man, not misled by misapprehension or misunderstanding will be very glad, day by day, to see improved conditions rather than to see unsatisfactory service continued.

Now, in respect of the internal conditions of this
3173 company, I thought that the Receiver should not make any radical changes, if at all, until after this motion shall have been heard. It seemed to me that it was perhaps inadvisable for him to endeavor to shape the internal policy of this company before he knew whether or not he was to be the single Receiver or to be associated with others. Therefore, I deemed it unwise that any steps should be taken which would be perhaps misunderstood from one quarter or another, and that except in so far as imminent demands were to be met, he should endeavor to preserve the status quo until after the
3174 hearing and determination of this motion. He has already started to investigate the situation, and from the official of the highest standing in point of authority and compensation to the employee of the humblest duties, the Receiver will of course make a careful investigation to see first what is the ability of the various officers and employees, and, secondly, what is their compensation, and thirdly, what in right and justice should be done or should be recommended to be done. By that I do not wish to be understood—because I am talking very frankly—as thinking for one moment that under present conditions of living it would be possible or fair or

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right to reduce in any manner, shape or form, the present wage of the man who in one capacity or another—men and women—as trainmen and gatemen, and the like, persons working in the power houses and on the tracks—I do not think for one minute that these compensations should be reduced, not through any mere notion in my mind, but because with the present cost of living it would be extremely desirous that a fair wage should be paid to these employees, most of whom, so far as I have been able to observe them, are earnest and intelligent and faithful, and who are entitled as 3176
a matter of health and safety to the public at large to be compensated at least at the rate at which they are now compensated, with no fear whatever of reduction in that regard. But in respect of others who can be replaced, the Receiver, of course, will make a careful examination to ascertain what is best in the interest of the company and its creditors—whether its creditors be individuals or be public bodies—what is best to be done. So much for that.

Now in respect to the financial situation, the arguments this morning have merely confirmed together with the report of the Receiver laid upon 3177
my desk, the conclusion that here is a very difficult situation, but a situation by no means impossible of solution. It is a situation where there are various interests, and no one interest should justly be subordinated beneath its legal rights. By whatever name called, the City has a large interest, and so have these persons who have purchased these notes aggregating outstanding now some fifty-seven million dollars. So, likewise, have the creditors of all kinds, tort and contract. All these have interests, and they will never attain the right result unless their attitude towards each other is

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one of co-operation. This receivership can be successful and I trust will be successful. If it fails to accomplish what all right-minded men hold it is to accomplish, it will fail merely because, through no fault of its own, it does not receive co-operation in every quarter, public and private.

In respect of the financial situation, it was very well said I think by several of the counsel that the situation is quite different from that in which some previous railway situations were found. It is perfectly plain that there must be a result—

3179 if there is to be a result—in the readjustment of this company by whatever name called, whether adjustment or reorganization or refinancing, which can be attained only by the concurrence of many elements. The kind of readjustment or reorganization which is possible where only it is concerned with private individuals who hold securities or stocks, is not possible here in the sense that such an arrangement can be made as has frequently been made outside of the Court. That problem is not at hand for the moment. But when the time comes that earnest men representing all interests,

3180 public and private, shall seek to solve this problem, they may as well understand now, all of them, that in view more especially of the recent practices and decisions of this Court, this receivership will not leave this court until any plan is thoroughly well understood by the Court and has the Court's approval. That is said because it is fair to state that no longer can those who are only privately interested in the sense of being private persons—privately interested is not a good phrase, I mean those who are private persons—can no longer arrange the basis upon which the future of the company in receivership shall be conducted, without

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that basis being of a character which is satisfactory to the Court, after full, free and fair discussion on the part of every one who has a right to be heard.

Having thus I think made clear several of the views which the Court entertains, and having by practically unanimous understanding made clear to the persons who are or will be tort claimants the position of the Court, I come to the final question with which we are now to deal.

Any application on the part of the City of New York, or on the part of the Public Service Commission is entitled to most careful and most respectful consideration. These gentlemen who represent these two important public bodies are either on the one hand the direct selection of the people, or on the other hand the selection of the people by the appointment of the Governor as the statute provides. Any application which comes from such sources is not lightly to be laid aside. But both Mr. Bisbee and Mr. Erbe, whom I have not the pleasure of knowing or seeing before today—the other counsel being I hope old friends and all known to me—they put the matter very aptly. The argument of the learned counsel for the City and the learned counsel for the Public Service Commission indicates that there is lack of agreement between these two great bodies in some respects which were stated. One official thinks that the other body is not entitled to representation. One counsel things that whatever else happens, there should at least be additional representation which would represent the city. I fear there has been a misapprehension as to what a receivership is. Under a receivership—I am stating the very simplest of principles—the property is taken into the possession of the Court. It is the Court's duty

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to conserve the property while thus in its possession. The Court has no power to breach contracts. Valid outstanding contracts and obligations must be observed. In a suitation of this kind there are obviously legal perplexities which will find their solution only in the determination of courts; in some instances perhaps in the determination of the United States District Court of the Southern District of New York; in other instances possibly by the determination of the New York Courts. The receiver cannot favor or omit to favor either pri-

3185 vate or public creditors by any action on his part. He is not a law unto himself any more than the Court is. The receiver is merely the instrument of the Court, because theoretically if the Court had the time it would be the Court's duty personally to administer itself the entire receivership.

I think the representatives of the City and of the Public Service Commission manifestly have some firm convictions as to the rights they represent and as to the policies which in their judgment should be pursued. Whether one or two additional men are appointed, it must be plain that it would

3186 be impossible for the Court successfully or intelligently to conduct a complex receivership of this kind with other receivers representing not the Court but representing some point of view which might or might not accord with the point of view entertained by the receiver appointed by the Court. Such a situation is not known in receiverships. Such a situation might seriously tend to destroy the efficiency of the receivership, and a receivership specially of this character, and might transfer from a forum outside the receivership and the Court the controversies which might properly be settled at some place and time other than by this Court.

All that this receiver is called upon to do is what I have heretofore stated. He is called upon to see that the road gets into good physical condition, if in any respect anything in that regard is to be done. He is called upon to operate this road to the best of his ability. He is called upon to meet present obligations as best he can. He is called upon to borrow money upon a proper showing that money is needed. He is called upon to use every effort within his power to obtain with the aid of the proper officials, the completion of thoes parts of this road which are not yet constructed and without which even any uninformed person must see 3188
that this road cannot reach its highest earning capacity, not to speak of its failure to supply to the people of the City those transportation facilities which they so hope for and to which they are entitled.

To repeat again, the whole situation is one where the Court is the receiver, and where the Court is entitled to have as its arm at all times singularity of purpose. It must be quite plain that the Court is unable at this time, either on the one hand to appoint a co-receiver, which would be simply hav- 3189
ing two men where in the Court's judgment in the circumstances of this case one man could competently do, or on the other hand, accepting not the Court's appointment, but the nomination by a public body of a gentleman charged with various responsible duties, who is necessarily very completely and greatly occupied otherwise, who shall act as receiver, not as the Court's arm, but as representing what is regarded as the rights of one of the very and extremely important units which have come into this situation.

3190 I do not for a moment foreclose the proposition that there may readily come in the course of this receivership a time when one or more receivers may be regarded as helpful and necessary to the Court. I can imagine that when the time comes to work out the financial future of this company; that the aid of a receiver representing at that time the united view of the public authorities, may be of great service, and I do not wish to be understood as dealing with anything but the situation as it now stands upon this 15th day of January, 1919.

3191 There may very well be a time—I repeat—when especially in dealing with the financial situation, it may become extremely helpful and cooperative to have an additional receiver, but I do not see that that time is here at the moment. At this moment what this receivership is concerned with is to get down to business as fast as it can. It has already started. No one questions the standing and ability of this receiver.

I may add, however, for the information of those who perhaps for the moment have lost sight of the fact that one of the great elements of value to the

3192 Court of this receiver, in addition to his known qualities of executive ability, is the fact that for many years he had the highly useful experience of being himself a Chancellor, a Judge of a Court of Equity, in a very great Court, which had had a reputation in the history of American jurisprudence second to none, in which Court it was his duty to sit where I now sit in the sense of being an administrator, and in which court, through a very long and varied experience, he became familiar with the obligations and duties which fall upon a Court of Equity in an administration of this character. I congratulate not merely myself but all those who

3193

are concerned that it was possible to have a man of that peculiar equipment in this extremely important and delicate situation, willing to lay aside in very great measure his private practice at the bar and devote himself, both as an administrator and as a former experienced Judge to the great problem with which he will have to deal.

In these circumstances, gentlemen who have addressed me, gentlemen of the Bar, I deny the motion for a co-receiver without prejudice to its renewal at such time as counsel may be advised.

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The Clerk will now announce an adjournment.

3195

3196 **Government's Exhibit 43—Notice and Order Continuing Receivership During Pendency of Suit.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3197	WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E 15-347.

3198 PLEASE TAKE NOTICE That an order of which the within is a copy was duly signed and entered on the 22nd day of January, 1919.

Dated, New York, January 22, 1919.

WALTER F. TAYLOR,
Solicitor for Plaintiff,
Office and P. O. Address,
54 Wall Street,
Borough of Manhattan,
New York City.

3199

To

LINDLEY M. GARRISON, Esq., Receiver.

GEORGE W. YEOMANS, Esq., Solicitor for Defendants.

WILLIAM P. BURR, Esq., Corporation Counsel for the City of New York.

GODFREY GOLDMARK, Esq., Solicitor for Public Service Commission.

3200

GEORGE S. FRANKLIN, Esq., Solicitor for War Finance Corporation.

PAUL D. CRAVATH, Esq., Solicitor for Central Union Trust Company of New York, et al., Stockholders' Committee.

ELDON BISBEE, Esq., Solicitor for Wiggins, et al., Stockholders' Committee.

3201

JOHN J. O'LEARY, Esq., Solicitor for Victims of Malbone Street Accident.

3202

Order Continuing Receivership.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	In Equity E 15-347.

3203

This cause came on to be further heard at this time and was argued by counsel; and thereupon, upon consideration thereof, it was

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ORDERED, ADJUDGED AND DECREED as follows, viz.:

Lindley M. Garrison, heretofore appointed temporary receiver of the defendants Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, and of their several and respective properties and assets, is hereby appointed and continued as receiver during the pendency of this suit

3205

of said defendants and each of them, and of all the property and assets of said several defendants, real, personal and mixed, of whatsoever kind and description, and wheresoever situated, including all power-houses, power plants and substations owned, leased or operated by defendant Brooklyn Rapid Transit Company, and all railroads owned, leased or operated by the defendants, New York Municipal Railway Corporation and New York Consolidated Railroad Company, or either of them, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue, as well as all interest, easements, privileges and franchises, and all assets of every kind, character and description of each of the defendants herein.

3206

Said receiver is authorized immediately to take and continue possession of and to run, manage and operate said properties and assets of the several defendants herein in such manner as will, in the judgment of said receiver, produce most satisfactory results, so that the operation of the system of street, surface and rapid transit lines controlled by the defendant Brooklyn Rapid Transit Company shall be continued and the public duties obligatory upon the respective defendants be in all respects discharged, and to exercise the authority and franchises of the respective defendants and

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discharge their public duties and preserve and protect the properties and assets of said several defendants in proper condition and repair, and to protect the title and possession, and to secure and develop the business of the same, and in the discretion of said receiver to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing.

Said receiver is hereby authorized to collect and
3209 receive the rents, income, tolls and profits of the properties and assets of the several defendants and each of them and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and said receiver shall have power to redeem any and all securities of the several defendants now pledged as security on loans of money, and shall have power to borrow money if needful in his judgment in order to comply with this direction, and also, so far as may be necessary, to meet current requirements for labor, materials and supplies, and for the other purposes in this
3210 order expressly authorized, but for no other purpose, without the further order of this Court; and said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property and trusts hereby reposed in him, and likewise to defend all actions instituted against him as receiver and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendants or any of them, the prosecution and defense of which will in the judgment of said receiver be

3211

necessary for the proper protection of the property placed in his charge or the interests and rights of creditors connected therewith; and said receiver is hereby authorized in his discretion from time to time out of the funds coming into his hands to pay the expenses of operating said properties and executing his trusts, and to make such repairs to said properties and premises as in his judgment may be necessary in order safely to conduct operations under this order and to pay all taxes and assessments upon said properties or any part thereof; and all such rentals and instalments as may fall 3212
or become due for the use of any portion of any of said properties; and also to pay and discharge all claims arising from the previous operation of said properties as in his judgment on examination are proper to be paid as expenses of operation and the current and unpaid payrolls and vouchers and supply accounts incurred in the operation of said property at any time within four months prior to the filing of the bill of complaint herein. Said receiver is hereby required to open books of account wherein shall be stated separately the earnings, expenses, receipts and disbursements in respect of 3213
the property of each of the defendants herein, and shall preserve proper vouchers for all payments made by said receiver.

Each of the defendants and each and every one of their respective officers, directors, agents and employees, and all persons claiming and acting by, through or under them, or any of them, are hereby required and commanded forthwith upon demand of said receiver, or of his duly authorized agent, to turn over and deliver to said receiver, or his duly authorized agent, any and all books of

3214 account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his hands, or under his control, and each of said directors, officers, agents and employees is hereby commanded and required to obey such orders as may be given to them from time to time by said receiver or his duly authorized agent, in conducting the operations of the properties and assets of the respective defendants and in discharging his duties as receiver.

The defendants Brooklyn Rapid Transit Com-
3215 pany, New York Municipal Railway Corporation and New York Consolidated Railroad Company, and each of them, and their and each of their officers, directors, agents and employees, and all other persons claiming to act by, through or under said defendants or any of them, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the properties and assets over which the receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of said property, and any party in interest may apply
3216 for further direction.

The statement of the powers, duties and rights of said receiver contained in this order supersedes, from and after the entry of this order, the statement thereof contained in the order dated and filed herein December 31, 1918.

The bond in the sum of One hundred thousand ($100,000) Dollars heretofore given by said receiver for the faithful performance of his duties and filed in this cause shall stand and said bond hereby is approved.

The applications made herein on behalf of the City of New York and on behalf of the Public

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Service Commission for the First District of the State of New York for the appointment of an additional receiver or receivers herein are hereby denied without prejudice to the right to renew said applications or either of them at such time as counsel may be advised.

Decision upon the application of the Public Service Commission for the First District of the State of New York for leave to intervene as a party herein is hereby reserved.

Notice of all subsequent proceedings herein other than those relating to the ordinary current administration of the receivership shall be given to the solicitors for the follwing, namely: 3218

The City of New York,

The Public Service Commission for the First District of the State of New York,

War Finance Corporation,

Central Union Trust Company of New York and others, as a Committee of Noteholders and Bondholders constituted and acting under a Deposit Agreement dated January 2, 1919. 3219

Albert H. Wiggin and others, as a Committee of Stockholders constituted and acting under a Deposit Agreement dated January 2, 1919.

The Association representing victims of Malbone Street accident which was heard through counsel at the proceedings on January 15, 1919.

Any party in interest may apply for further direction.

Dated, New York, January 22, 1919.

JULIUS M. MAYER,
U. S. D. Judge.

3220

(Endorsed.)

C15-347

District Court of the U. S. for the Southern District of New York. — Westinghouse Electric & Manufacturing Company, Plaintiff, against Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, Defendants.

3221

Order and Notice.

Walter F. Taylor, Solicitor for Plaintiff, 54 Wall Street, Borough of Manhattan, New York City, — U. S. District Court. — Filed, Jan. 22, 1919. — S. D. of N. Y.

3222

Government's Exhibit 46—Application of Receiver for Leave to Employ Certified Public Accountants. 3223

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff,	3224
against	Equity E15-347.
BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Notice of Motion.

Sirs:

3225

PLEASE TAKE NOTICE that on the annexed verified petition of LINDLEY M. GARRISON, as Receiver of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, we will move this Court before the Honorable Julius M. Mayer at Room 235, Post Office Building, New York City, New York, on the 27th day of January, 1919, at 2:00 o'clock P. M. or as soon thereafter as counsel can be heard, for an order granting the relief prayed for in said petition and

3226

for such other and further relief as to the court may seem proper.

Dated, New York City, January 22, 1919.

Yours, etc.,

HORNBLOWER, MILLER,
GARRISON & POTTER,
Solicitors for Receiver,
Office & Post Office Address,
24 Broad Street,
Borough of Manhattan,
New York City.

3227

To

WALTER F. TAYLOR, Esq.,
Solicitor for Plaintiff.

GEORGE D. YEOMANS, Esq.,
Solicitor for Defendants.

WILLIAM P. BURR, Esq.,
Corporation Counsel of the City of New York.

3228

WILLIAM L. RANSOM, Esq.,
Solicitor for the Public Service Commission for the First District.

CRAVATH & HENDERSON, Esqs.,
Attorneys for Central Union Trust Company of New York and others, constituting a Committee of Note Holders.

3229

RUSHMORE, BISBEE & STERN, Esqs.,
CULLEN & DYKMAN, Esqs.,
Attorneys for Committee of Stockholders of the Brooklyn Rapid Transit Company.

JOHN J. O'LEARY, Esq.,
Attorney for certain Tort Claimants.

CENTRAL UNION TRUST COMPANY OF NEW YORK,
Trustee under various mortgages and deeds of trust of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company.

3230

EQUITABLE TRUST COMPANY OF NEW YORK,
Trustee of the First Mortgage of the Brooklyn Rapid Transit Company to Central Trust Company of New York, dated, October 1, 1895.

GEORGE S. FRANKLIN, Esq.,
Solicitor for the War Finance Corporation.

3231

3232 **Government's Exhibit 46.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Equity E15-347.

APPLICATION OF RECEIVER FOR LEAVE TO EMPLOY CERTIFIED PUBLIC ACCOUNTANTS.

3234

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Lindley M. Garrison, Receiver of the defendants Brooklyn Rapid Transit Company, New York Consolidated Railroad Company and New York Municipal Railway Corporation, duly appointed herein, upon information and belief, respectfully shows to the court as follows:

It has been suggested to your petitioner that there should be a partial audit of the books and

3235

accounts of the receivership companies and in the event that such partial audit should indicate that a general audit is desirable that such general audit should thereupon be undertaken. It is suggested that it would probably be wise to make a test audit covering a limited period, say at least two or three months, in order to determine whether or not the general system of accounting is thorough and satisfactory.

It is further suggested that assuming that an examination did not indicate the necessity of a general audit for a longer period certain particular questions should be the subject of special investigation by the accountants in consultation with the traffic and engineering experts. 3236

In the opinion of petitioner it is advisable that certified public accountants should be employed by him in accordance with this suggestion and that the expense involved should be initially paid by the receivership estate with the understanding that eventually the receivership estate will be reimbursed for said expense by one or more of the Committee of security holders interested in securing the information furnished by such accounting to such extent as the Court may ultimately determine to be equitable. 3237

WHEREFORE, your petitioner prays that he may be authorized and directed to employ certified public accountants to make such an examination of the books and accounts of the companies whose properties are in the possession of your Receiver as to him may seem wise, and that he may

3238

be authorized initially to pay the cost of such accounting out of the funds in his possession.

Brooklyn, N. Y., January 22, 1919.

HORNBLOWER, MILLER,
GARRISON & POTTER,
Solicitors for Receiver,
Office & Post Office Address,
24 Broad Street,
Borough of Manhattan,
City of New York.

3239 CARL M. OWEN,
Of Counsel.

County of New York, ss.:
State of New York,

LINDLEY M. GARRISON, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and
3240 belief, and that as to those matters he believes it to be true.

(Signed) LINDLEY M. GARRISON.

Sworn to before me this
22nd day of January, 1919.

WM. R. SAINSBURY,
Notary Public (Seal),
Kings County, No. 20.
Certificate filed in N. Y. County No. 380; New York Register No. 10333.
Commission expires Mar. 30, 1920.

Government's Exhibit No. 51—Order Authorizing Receiver to Employ Certified Public Accountants. 3241

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Equity E15-347.

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3243

SIRS:

PLEASE TAKE NOTICE that an order of which the within is a copy will be presented to the Honorable Julius M. Mayer, Judge of this Court, for settlement and signature at his Chambers in the United States District Court for the Southern District of New York in the Woolworth Building, in

3244

the City of New York, on the 1st day of February, 1919, at 10:00 o'clock in the forenoon.

Dated, New York, N. Y., January 30, 1919.

Yours, etc.,

HORNBLOWER, MILLER, GARRISON
& POTTER,
Solicitors for Lindley M. Garrison,
Receiver,

3245

Office & Post Office Address,
24 Broad Street,
Borough of Manhattan,
New York City.

To

WALTER F. TAYLOR, Esq.,
Solicitor for Plaintiff.

GEORGE D. YEOMANS, Esq.,
Solicitor for Defendants.

3246

WILLIAM P. BURR, Esq.,
Corporation Counsel of The City of New York.

GODFREY GOLDMARK, Esq.,
Solicitor for the Public Service
Commission for the First District.

GRAVATH & HENDERSON, Esqs.,
Attorneys for Central Union Trust Company
of New York and others, constituting a
Committee of Note Holders.

3247

RUSHMORE, BISBEE & STERN, Esqs.,
CULLEN & DYKMAN, Esqs.,
Attorneys for Committee of Stockholders of the Brooklyn Rapid Transit Company.

JOHN J. O'LEARY, Esq.,
Attorney for certain Tort Claimants.

LARKIN & PERRY, Esqs.,
Solicitors for Central Union Trust Company of New York, Trustee under various mortgages and deeds of trust of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company.

3248

MURRAY, PRENTICE & HOWLAND, Esqs.,
Solicitors for Equitable Trust Company of New York, Trustee of the First Mortgage of the Brooklyn Rapid Transit Company to Central Union Trust Company of New York, dated October 1, 1895.

GEORGE S. FRANKLIN, Esq.,
Solicitor for the War Finance Corporation.

3249

3250 **Government's Exhibit 51—Order.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, Plaintiff, against BROOKLYN RAPID TRANSIT COMPANY, NEW YORK MUNICIPAL RAILWAY CORPORATION and NEW YORK CONSOLIDATED RAILROAD COMPANY, Defendants.	Equity E15-347. Order.

3251

On reading and filing the petition of LINDLEY M. GARRISON, as Receiver of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, verified January 22, 1919, requesting authority to employ certified public accountants, and it appearing that due notice of this petition was given to Walter F. Taylor, Esq., Solicitor for plaintiff; George D. Yeomans, Esq., Solicitor for defendants; William P. Burr, Esq., Corporation Counsel of the City of New York; Godfrey Goldmark, Esq., Solicitor for the Public Service Commission for the First District; Cravath & Henderson, Esqs., Attorneys for Central Union Trust Company of New York and others, constituting a Com-

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mittee of note holders; Rushmore, Bisbee & Stern, Esqs., and Cullen & Dykman, Esqs., Attorneys for Committee of Stockholders of the Brooklyn Rapid Transit Company; John J. O'Leary, Esq., Attorney for certain tort claimants; Central Union Trust Company of New York, Trustee under various mortgages and deeds of trust of the Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company; Equitable Trust Company of New York, Trustee of the First Mortgage of the Brooklyn Rapid Transit Company to Central Union Trust 3254
Company of New York, dated October 1, 1895; and George S. Franklin, Esq., Solicitor for the War Finance Corporation; and no one appearing in opposition,

Now, on motion of HORNBLOWER, MILLER, GARRISON & POTTER, solicitors for Lindley M. Garrison, as said Receiver, it is

ORDERED, that said Lindley M. Garrison as said Receiver be and he is hereby authorized and directed

(1) To employ certified public accountants to 3255
make such examination of the books and accounts of the companies whose properties are in the possession of said Receiver as to him may seem wise, and

(2) To pay the cost of such accounting out of the funds in his possession, subject, however, to the reservation that, as this Court may ultimately determine, arrangements may be made by which the cost of such accounting shall be reimbursed in whole or in part to the Receiver by any party or parties to this proceeding and by one or more of

3256

the Committees of security holders interested in securing and obtaining the benefit of the information furnished by such accounting.

Nothing herein contained shall be deemed in any way to limit the Court in making such further order or orders respecting an examination of the books of the said companies as to the Court may seem wise.

Dated, New York, N. Y., Feb. 1, 1919.

JULIUS M. MAYER,
U. S. D. J.

3257

Government's Exhibit No. 109—Bill of Complaint (Verified March 20, 1919).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3258

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against

NEW YORK RAILWAYS COMPANY,
Defendant.

To the Judges of the District Court of the United States for the Southern District of New York:

Plaintiff, the American Brake Shoe and Foundry Company, a corporation duly organized and exist-

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ing under the laws of the State of Delaware, and a citizen of said State, brings this its bill of complaint on its behalf and on behalf of all other creditors of New York Railways Company, defendant, who may hereafter join in the prosecution of this suit against the New York Railways Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, resident in the Southern District of New York, and thereupon plaintiff alleges as follows:

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FIRST.—That plaintiff, The American Brake Shoe and Foundry Company, is a corporation duly organized and existing under the laws of the State of Delaware and a citizen and resident of said State.

SECOND.—On information and belief, that the defendant was at all the times hereinafter mentioned and is a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, having its principal office in the City of New York, and a resident of the Southern District of New York.

3261

THIRD.—That this is a suit of a civil nature in equity; that the matter in dispute exceeds the sum of Five thousand Dollars ($5,000.00), exclusive of interest and costs, and is between citizens of different States.

FOURTH.—On information and belief, that the defendant, New York Railways Company, is a street surface railroad corporation duly formed

3262 pursuant to Sections 9 and 10 of the Stock Corporation Law by the filing of its certificate of incorporation in the office of the Secretary of State on or about the 29th day of December, 1911; that on or about the 29th day of December, 1911, the railroads, franchises and properties of the Metropolitan Street Railway Company were sold to a purchasing committee representing holders of certain issues of Metropolitan Street Railway Company bonds pursuant to various decrees of foreclosure and sale filed in the office of the clerk of the United
3263 States Circuit Court for the Southern District of New York in certain causes in equity therein pending; that in the two separate decrees confirming such sale by the United States Circuit Court express provision was made for the assignment by the purchasers of the properties and railroads so acquired to a corporation of the State of New York authorized by law to receive title to and to operate such properties and railroads; that defendant, which had been duly formed pursuant to the provisions of law applicable to the reorganization of insolvent corporations by said purchasers and
3264 their associates, for the purpose of carrying out and performing a plan and agreement of reorganization theretofore entered into to take and possess the railroads, franchises and properties of the Metropolitan Street Railway Company so sold and acquired by the purchasers, on December 30, 1911, entered into an agreement of sale with said purchasers; that thereafter, by deed dated December 30, 1911, and recorded in the office of the Register of the County of New York in Liber 3 of General Conveyances, at page 34, said purchasing committee conveyed all such railroads, franchises and properties to the defendant. That defendant is

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now the owner of all the railroads, franchises and properties formerly belonging to the Metropolitan Street Railway Company and is vested with all the rights and is subject to all the obligations of that company; that the defendant entered into possession of the said railroads, franchises and properties at midnight on December 31, 1911, and has continuously operated said railroads since that date.

FIFTH.—On information and belief, that the defendant is the owner of and operates certain street surface railroads in and on certain streets, high- 3266
ways and public places in the Borough of Manhattan, City of New York, and in addition to the railroad owned operates in connection therewith, either as lessee or under the terms of operating agreements, the street surface railroads in the Borough of Manhattan of the following companies:

The Broadway and Seventh Avenue Railroad Company,
The Bleecker Street and Fulton Ferry Railroad Company,
Christopher and Tenth Street Railroad Com- 3267
pany,
Eighth Avenue Railroad Company,
Fort George and Eleventh Avenue Railroad Company,
The Forty-second Street and Grand Street Ferry Railroad Company,
New York and Harlem Railroad Company (City Line),
The Ninth Avenue Railroad Company,
The Sixth Avenue Railroad Company in the City of New York,

3268

Thirty-fourth Street Crosstown Railway Company,

Twenty-third Street Railway Company, and that under the leases of the aforesaid properties it is, among other things, provided that in case the defendant shall fail to pay the rent provided for in said leases as the same should accrue, and any such default should continue for certain periods therein stated, the leasehold estate hereby created might, at the option of the lessors, be terminated.

3269 SIXTH.—On information and belief, that said defendant has an authorized capital stock issued and outstanding of $17,495,060.00; that the lines of railway owned by said defendant are subject to the following mortgage indebtedness, which is now outstanding:

	Amount Outstanding
First Real Estate and Refunding Mortgage	$18,061,289.75
Adjustment Mortgage	30,609,487.44
3270 Convertible Scrip	2,250.00
Lexington Avenue and Pavonia Ferry Railroad Company, First Mortgage	5,000,000.00
Columbus and Ninth Avenue Railroad Company, First Mortgage	3,000,000.00
Broadway Surface Railroad Company, First Mortgage	1,500,000.00
South Ferry Railroad Company, First Mortgage	350,000.00
Central Crosstown Railroad Company, First Mortgage	250,000.00

3271

That the lines leased or operated under agreement are subject to the following mortgage indebtedness now outstanding:

Broadway and Seventh Avenue Railroad Company, First Consolidated Mortgage	$8,150,000.00
Christopher and Tenth Street Railroad Company, First Mortgage	210,000.00
Twenty-third Street Railway Company, Improvement and Refunding Mortgage	1,500,000.00
Bleecker Street and Fulton Ferry Railroad Company, First Mortgage	700,000.00
Thirty-fourth Street Crosstown Railway Company, First Mortgage	1,000,000.00

3272

That plaintiff is informed and believes that failure to meet the interest on such mortgage indebtedness, as such interest matures, other than interest on the aforesaid Adjustment Mortgage indebtedness, which accrues only as earned, will operate also as a default under the mortgage securing the indebtedness the interest on which shall so become in default and render such mortgage enforceable.

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SEVENTH.—On information and belief, that the defendant, since entering into possession as aforesaid, has operated all the lines owned and leased by it as parts of a single system, constituting routes over different lines or parts of line, connecting separated lines over parts of intermediate leased or owned lines or lines of controlled companies, interchanging equipment among the various lines and furnishing equipment as might be required to meet

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from time to time the varying requirements of particular lines, supplying power and using power houses, car barns and stations as seemed best for the effective and economical operation of the system as a whole, and also establishing a system of transfers between various lines and routes; that the defendant owns equipment to a substantial amount, which has been used over the system as varying requirements of operation made necessary, without assignment to any particular line or lines; and the plaintiff is informed and believes that many of the
3275 leased lines in defendant's system are without adequate equipment of their own; and that in many cases the motive power employed on leased lines or lines of controlled companies has been changed to electricity without supplying said lines with independent power houses or other independent sources of supply of power, leaving such lines dependent for power on other lines of the system.

EIGHTH.—That the defendant is indebted to the plaintiff in the sum of Thirty-six Thousand Eight Hundred and Six and 26/100 ($36,806.26) for
3276 brake shoes and miscellaneous castings furnished and supplied by plaintiff to the defendant, at the request of the defendant, and for which the defendant agreed to pay plaintiff said sum of Thirty-six Thousand Eight Hundred and Six and 26/100 Dollars ($36,806.26), and payment of said sum has been duly demanded by plaintiff from the defendant and payment thereof refused, and the same is now wholly due and unpaid; that said material was so supplied to the defendant for the purposes of the operation of its street railway system and to enable the defendant to comply with and fulfill the

3277

duty towards the public which the defendant, as well as the respective lessors of the defendant, owed to the public, and to discharge its and their obligations respectively under the franchises for the operation of their respective lines, and were used for the purposes aforesaid.

NINTH.—On information and belief, that since entering into possession of the premises the defendant has expended large sums, aggregating more than Three Million Dollars ($3,000,000), in making improvements and additions and other capital 3278
expenditures to and upon lines of its system, including its leased lines, and that said expenditure has greatly benefited such lines of railroad and the value of said leased properties, but that the defendant has no further resources for any further expenditures that may be needed; that the defendant has been required, and will be required, to make large expenditures for the maintenance and repair of its system, and that the defendant will be unable to pay therefor, although immediately necessary for the operation of its lines; that in the course of the operation of its lines numerous ac- 3279
cidents have occurred, in respect of which suits have been brought and are now pending, and that said suits to the number of several thousand are now upon the calendars of the courts awaiting trial, and that the defendant will be without means to meet judgments recovered in said suits; that there is a suit upon the calendar of this court growing out of the reorganization of the Metropolitan Street Railway Company in which it is claimed that the defendant is liable for upwards of One Million Dollars ($1,000,000), and the de-

3280 fendant will be without means to meet any judgment recovered thereon.

TENTH.—That plaintiff is informed by the officers of the defendant and believes that the defendant has outstanding floating indebtedness for materials, equipment, taxes, rentals and supplies furnished, to the amount of upwards of One Million Six Hundred Thousand Dollars ($1,600,000); that said floating indebtedness is now overdue; that the defendant is unable to pay the same, and
3281 that the holders thereof are pressing for payment thereof; that some of said creditors may bring suits in respect of their said claims, and may levy execution on the lines of railroad owned by the defendant and on the material and supplies and other property of the defendant on hand and kept by the defendant for necessary use in operating said railway system, and plaintiff alleges that there is grave danger that the lines of the defendant may no longer be operated in a single system, but the various lines which are now owned or leased by the defendant may be broken up and be separately
3282 operated; that there is likewise grave danger that suits may be instituted against the defendant in respect of the claims above stated; and that it is essential to the interest of the public and to plaintiff that the property of the defendant should not be sacrificed; that the position of defendant is the more acute by reason of the present bad financial situation of public service corporations generally; that there are outstanding unpaid special franchise taxes for the year 1900 against the property of defendant and certain of the lessors, which with interest claimed to be due thereon, amount to ap-

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proximately Five Hundred Thousand Dollars ($500,000); that such taxes constitute liens upon the special franchises of the companies affected, and that there is likelihood of steps being taken by the officers of the City of New York to sell such liens in the manner provided by law; that for the fiscal year ending June 30, 1918, the results from operation of defendant's system were such that the income of the year received from all sources was $153,633.87 less than the amount required to pay the interest on the First Real Estate and Refunding Mortgage 4% Bonds; that, for the six months 3284
ending December 31, 1918, the defendant's income of the period was $738,187.50 less than the amount sufficient to pay such interest; that on December 31, 1918, defendant's corporate deficit was $2,125,039.32; that all of defendant's special and reserve funds have been exhausted, and that defendant has not sufficient credit to obtain the moneys required for the operation of its properties.

ELEVENTH.—On information and belief, that the only means whereby the defendant can meet its obligations under said leases and pay its floating 3285
indebtedness and discharge its current obligations, is by the continued maintenance and operation of said system as a whole by an uninterrupted use thereof; that any suits upon or process against its properties or its revenues would seriously embarrass and cripple it, and diminish, if not destroy, its power successfully to operate said system, in the exercise of its franchises; that said system, together with all its appurtenances, rolling stock and other property connected therewith are now in a reasonably good state and condition; that during the last

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year the lines owned or leased by the defendant carried over Three Hundred Million (300,000,000) passengers, and the average number of persons employed by the defendant will exceed Six Thousand (6,000); that it is of vital importance to the peoples of the City of New York; that said system shall continue to be operated as a whole, and to this end it is of like importance that said system shall be preserved; that notwithstanding the fact that every effort has been made to provide funds for the payment of the indebtedness of the defendant,

3287 or for the extension of the time of payment thereof, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all the creditors so that the operation of defendant's system may be kept intact, great and severe loss will be inflicted upon all creditors; that the credit of the defendant has been seriously impaired; that it has not money to pay the debts which have matured; and has no reasonable hope of finding assistance from any quarter to enable it to do so, and that the defendant is insolvent.

Plaintiff further alleges, on information and be-

3288 lief, that unless the Court, in view of the facts above set forth, shall take said system of the defendant into judicial custody for the protection of every interest therein, that immediately upon default, individual creditors will assert their rights and remedies in different Courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgment and priorities; that levies will be made upon cars, rolling stock, material and supplies indispensable to the operation of the system, which will greatly interfere with, and ultimately prevent de-

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fendant from, the proper performance of its duties as a common carrier and will seriously diminish its earnings; that it will be impossible to operate the system as a whole, and the system of transfers among the lines in said system will be broken up, to the serious inconvenience of the public, and a most important and valuable property dismembered, which might be preserved by adequate judicial protection in this Court.

On information and belief, that an attempt by plaintiff to enforce at law its claims as a general creditor would precipitate similar action on the 3290
part of other creditors, and this in turn would lead to wasteful strife and controversy, which plaintiff believes can be avoided, and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a Court of equity and the granting of equitable relief, including the appointment of a Receiver.

TWELFTH.—That, under these circumstances, the interferences of a Court of equity for the protection of plaintiff's rights, is imperatively required, and
especially for the timely appointment of a Re- 3291
ceiver to take charge of and preserve the property of the defendant, continue the operation of its system for the accommodation of the public, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

THIRTEENTH.—In as much, therefore, as plaintiff has no adequate remedy at law for its aforesaid grievances, and can have relief only in equity, plaintiff files this bill of complaint in behalf of

3292 itself and other creditors of the defendant, who may come in and contribute to the expense hereof, and prays for equitable relief, as follows:

1. That the rights of plaintiff and of all creditors of the defendant may be ascertained and decreed, and that the Court will fully administer the fund in which plaintiff is interested, constituting the entire railroad system and other assets of the defendant, and will for such purpose marshal all the assets of the defendant and ascertain the several
3293 and respective liens and priorities existing thereon, and enforce and decree the rights, liens and equities of the creditors of the defendant, as the same may be finally ascertained and decreed by the Court.

2. That for the purpose of preserving the unity of the system of the defendant as it has been maintained and operated a Receiver may be appointed for the defendant and of all the property and assets of the defendant, real, personal and mixed, of whatsoever kind and description and wheresoever situated, including all railroads owned, leased or
3294 operated, tracks and terminal facilities, rolling stock, franchises, leases, rights and properties, with full power to sue for, collect, receive and take into his possession goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers and property and assets of every description of the defendant and with all the incidental powers ordinarily vested in Receivers in like cases and with full power and authority to operate such railroads, property and assets, and to collect and receive all the rents, issues, profits and income thereof, and to apply the same under the orders or decrees of

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this Court, for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property, and to preserve the corporate existence of the defendant, and to protect and preserve the said railroads, property and assets from being sacrificed under any proceedings which can or may be taken liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve valuable rights and franchises of the defendant, or otherwise requisite or proper.

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3. That temporarily and pending this suit an injunction may issue against the defendant and all persons claiming and acting by, through or under it, and all other persons, to restrain them from interfering with said Receiver taking possession of said property, and that plaintiff may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

4. That the defendant be required to answer all and singular the matters above stated.

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5. That a writ of subpoena may be granted to plaintiff be directed to the defendant, thereby requiring the defendant personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath; answer under oath being hereby expressly waived; and further to perform and abide by such further order, direction or decree therefor as to the Court shall seem meet.

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6. That plaintiff have such further and other relief as the Court may deem proper and equitable.

(Signed) GEORGE M. JUDD,
Solicitor for Plaintiff,
Office and P. O. Address,
30 Church Street,
Borough of Manhattan,
N. Y. City, N. Y.

3299

State of New York,
County of New York, } ss.:

William G. Pearce, being duly sworn, deposes and says that he is the President of The American Brake Shoe and Foundry Company, the plaintiff named in the foregoing bill of complaint; that he makes this affidavit for and in its behalf and is duly authorized so to do; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be al-
3300 leged on information and belief, and as to those matters he believes it to be true; that the sources of deponent's knowledge and the grounds of his belief as to all matters not stated upon plaintiff's own knowledge are as follows: Deponent has made inquiries concerning the present condition of the defendant, New York Railways Company, from one or more of the principal officers of said company, and from such inquiries has obtained the

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information concerning the facts alleged in said bill of complaint upon information and belief.

(Signed) WILLIAM G. PEARCE.

Subscribed and sworn to before me
this twentieth day of March, 1919.

(sgd) E. B. SIBBALD,
Notary Public,
New York County No. 513.
Certificate filed in N. Y. Co. Register's Office
No. 9395
Commission expires March 30, 1919.
Notarial Seal.
Filed U. S. D. Ct., S. D. of N. Y., March 21, 1919.

3302

Government's Exhibit No. 110—Answer (Verified March 20, 1919).

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3303

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against NEW YORK RAILWAYS COMPANY, Defendant.	In Equity.

NEW YORK RAILWAYS COMPANY, the defendant in this case, for answer to the bill of com-

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plaint herein, or unto so much and such parts thereof as the defendant is advised it is necessary or material for this defendant to make answer unto, answering, says:

FIRST.—The defendant admits all the allegations of said bill of complaint.

SECOND.—The defendant, reiterating the admissions of the preceding article of this answer, joins in the prayer of said bill of complaint and prays

3305 that this Court, sitting in equity, may take possession of the system of the defendant through the appointment of a Receiver as prayed in said bill of complaint and thereby preserve the unity of the system of the defendant as it has been maintained and operated and protect and preserve the corporate franchises, privileges and property and preserve the corporate existence of the defendant and protect and preserve its said system and its said property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all acts which may be necessary to

3306 preserve the valuable rights and franchises of the defendant, and it accordingly prays that inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for this defendant, that this Court will, for the purposes aforesaid, appoint a Receiver as prayed for in said bill of complaint, and empower and authorize such Receiver to take possession of the entire property of this defendant and to preserve, manage, operate and control the same, pay all indebtedness due or to become due by this defendant, and otherwise discharge all the

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duties ordinarily imposed by the Courts upon Receivers in similar cases; that on the final hearing in this cause this Court will, under said bill of complaint and this answer, or such supplemental bill as shall be filed therein, make such decree or decrees with respect to the property of this defendant as shall deal with the same on general equitable principles, and that this Court will cause all the liens upon said property, or any part thereof, and all rights and claims in equity of persons interested therein, to be ascertained, defined and determined, and that the proceeds arising from the sale of said 3308
property, or any part thereof, be applied under the said orders or decrees of this Court according to the rights, interests and equities of the parties interested therein, and that this Court will direct all persons in possession of the property of this defendant, or any part thereof, to surrender the same to such Receiver or to hold such property under said Receiver.

J. L. QUACKENBUSH,
Solicitor for Defendant.

3309

RICHARD REID ROGERS,
Of Counsel.

Southern District of New York,
State of New York,
County of New York, } ss.:

Theodore P. Shonts, being duly sworn, doth depose and say that he is the President of the New

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York Railways Company, the defendant in this suit; that he has read the foregoing answer to the bill of complaint in this suit and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

THEODORE P. SHONTS.

Sworn to before me this
3311 20 day of March, 1919.

J. C. NORRIS,
Notary Public,
Nassau County.
(Notarial Seal.)
Certificate filed in New York County No. 89.
N. Y. County Register's Office No. 9070.
Term expires March 30, 1919.
(Filed U. S. D. Ct., S. D. of N. Y., March 21, 1919.)

3312

Government's Exhibit No. 111—Order Appointing Temporary Receiver. 3313

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against NEW YORK RAILWAYS COMPANY, Defendant.	In Equity. 3314

And now on this 20th day of March, 1919, this cause came on to be heard upon the bill of complaint and on the answer of the defendant thereto this day filed, upon motion for the appointment of a Receiver, and after hearing George M. Judd, Esq., for the plaintiff, and James L. Quackenbush, Esq., for the defendant, and after due deliberation, the Court 3315 being fully advised in the premises,

It is ORDERED, ADJUDGED AND DECREED, that Job E. Hedges, of the City of New York, be and he hereby is appointed temporary Receiver of the defendant New York Railways Company, and of all the property and assets of the said defendant real, personal and mixed of whatsoever kind and description and wheresoever situated, including all railroads, owned, leased or operated by said defendant, all tracks, terminal

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facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profit and income accruing and to accrue as well as all interest, easements, privileges and franchises and

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all assets of every kind, character and description of the defendant herein; that the said Receiver be, and he hereby is, authorized immediately to take possession of the same and to run, manage and operate the said railroads, properties and assets in such manner as will in his judgment produce most satisfactory results so that the operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged, and to exercise the authority and franchises of defendant and discharge

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its public duties and to preserve and protect its said system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same, and in his discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said Receiver be, and he hereby is, authorized to collect and receive the rents, income, tolls and profits of the said railroads, properties and

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assets, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and he shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to borrow money if needful in his judgment in order to comply with this direction, and also, so far as may be needful to meet current requirements for labor, materials and supplies, but for no other purpose without the further order of this Court: and the said Receiver is hereby fully authorized and empowered to institute and prosecute all 3320
such suits as may be necessary in his judgment for the proper protection of the property and trust hereby reposed in him and likewise to defend all actions instituted against him as Receiver, and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendant, the prosecution and defense of which will in the judgment of said Receiver be necessary for the proper protection of the property placed in his charge, or the interests and rights of creditors connected therewith; and the said Receiver is hereby authorized in his discretion from 3321
time to time, out of the funds coming into his hands, to pay the expenses of operating the said properties and executing his trusts, and all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in his judgment on examination are proper to be paid as expenses of operation and the current and unpaid payrolls and

3322 vouchers and supply accounts incurred in the operation of said railroad system at any time within four months prior hereto. The said Receiver is hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts and disbursements of his said trust, and preserve proper vouchers for all payments by him made on account thereof.

And it is further ordered, that the bond of the said Receiver in the sum of One hundred thousand dollars, conditioned that he will and truly perform
3323 the duties of his office and duly account for all moneys or property which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties, to be approved of by a judge of this Court, be forthwith filed in the office of the Clerk of this Court;

And it is further ordered that the defendant, said New York Railways Company, and each and every of its officers, directors, agents and employees and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said Receiver, or his duly authorized
3324 agent, to turn over and deliver to said Receiver, or his duly constituted representative, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or in their hands or under his or their control, and each of said directors, officers, agents and employees is hereby commended and required to obey and perform such orders as may be given to them from time to time by the said Receiver or his duly constituted representative, in conducting the operation of the said system, properties and assets, and in discharging his duties as Receiver.

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And the defendant, said New York Railways Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of the same, and any party in interest may apply for further direction.

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And it is further ordered that the parties hereto show cause before this Court at Room 235 at the United States Post Office Building in the City of New York on the 31 day of March, 1919, at 4 o'clock in the afternoon, why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated, New York, March 20, 1919.

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JULIUS M. MAYER,
United States District Judge.

(Filed U. S. D. Ct., S. D. of N. Y., March 21, 1919.)

3328 **Government's Exhibit No. 113—Stenographer's Minutes on Return of Order to Show Cause Why Receivership Should Not be Continued.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before—Hon. JULIUS M. MAYER, J.

3329 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

vs.

NEW YORK RAILWAYS COMPANY,
Defendant.

New York, March 31, 1919.

APPEARANCES:

3330 GEORGE M. JUDD, Solicitor for Plaintiff.

JAMES L. QUACKENBUSH, Solicitor for Defendant; Ralph Norton, Richard Reid Rogers, of Counsel.

WILLIAM P. BURR, Corporation Counsel, Solicitor for the City of New York; Edgar J. Kohler, of Counsel.

MURRAY, PRENTICE & HOWLAND, Solicitors for Five Per Cent. Bondholders' Committee; Charles P. Howland, A. L. Obre, of Counsel.

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RUSHMORE, BISBEE & STERN, Solicitors for Protective Committee of the Stock of the Interborough Consolidated Corporation; Alfred E. Mudge, of Counsel.

McADOO, COTTON & FRANKLIN, Solicitors for Four Per Cent. Bondholders' Committee; Joseph P. Cotton, of Counsel.

WILLIAM J. GRIFFIN, Solicitor for National Surety Company; also present, but not appearing of record.

3332

MARK HYMAN for the Bondholders of Fulton Street Railroad Company.

CRAVATH & HENDERSON (by Robert T. Swaine), for Interborough-Metropolitan Four and a Half Per Cent. Bondholders' Committee.

SAMUEL SEABURY, JOHN V. BOUVIER, ROBERT H. EARNEST, CHARLES STECKLER, for Tort Committee, etc.

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The Court: The question is on the return of the order to show cause.

Mr. Judd: I desire to present an order, if your Honor please, continuing the receivership.

The Court: Does anyone desire to be heard? The Corporation Counsel?

Mr. Burr: Your Honor, I am here to aid the Court with whatever suggestion or information I am able to supply that will be helpful in properly administering this receivership, if it is to be continued.

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The plaintiff in its complaint expresses its desire through this receivership to preserve the unity of the property as it is at present maintained, and the defendant admits that the receivership is necessary for that very purpose, and I am here to ask and to urge your Honor not only to preserve the property and the railway system as it is at present maintained, in the interest of the creditors, but also to maintain the present system of compulsory free transfers in the interest of the public.

I submit an affidavit here. The City is not only
3335 a creditor to the extent of about a million dollars, but, as you know, it is also the grantor of the various franchises under which this defendant company and its subsidiary companies, or controlled companies, are being operated. I have presented to your Honor a list of such franchises, such lists not being entirely exclusive or inclusive of all the franchises granted, and I will ask the privilege later on of submitting to your Honor, to guide and aid the Receiver, a graphic chart showing the franchises granted by the City in which free transfers are provided.

3336 The fact is that the transfers are not only provided for by the franchises themselves, but they are also provided for by the Railroad Law. Since the receivership of the Metropolitan Street Railway Company in 1907 the law regulating these matters has been changed, because of the things which came to light and were developed in that receivership.

The Receiver, of course, immediately will be confronted with demands for the termination of various leases under which this system is being operated. The New York Railways Company today pays in rentals $1,936,000. That rental is made up of guaranteed payments upon the stock of the

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various companies whose railroads it acquired or leased, in some instances as high as 26 per cent.

It will be necessary for the Receiver immediately to give his attention to the question as to whether a scaling down of these rentals will not be sufficient to preserve the unity of this property without any disintegration whatsoever.

The object of the Court, I take it, will be to conserve this property, as Judge Peckham said in the Metropolitan case, to conserve it quickly, though in that case it took four years.

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The statute now provides that where there is a question of transfers an application must be made to the Public Service Commission, and the Public Service Commission has full power and authority, under Section 49, I think it is, Subdivisions 3 and 7, to take testimony and to provide by its decree or certificate for the proper regulation of these railroads in that regard.

Not only that, but it has the power to fix joint rates if even the leases are terminated, because of the necessities of the lessors for their money.

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What I desire to recommend to your Honor in the interest of the City, and in the interest of the creditors, and in the interest of this company, is that your Honor at once take steps to have the Receiver acquainted, through a public hearing conducted before your Honor, with all the facts with regard to that situation, so that you may be fully apprised and fully advised as to what measures later on you may deem it prudent and necessary to take for the purpose of conserving and preserving and not disintegrating this property.

It was with that in mind that I submitted this morning, appearing specially for the City, this

3340 affidavit containing such information as I think will be helpful and useful to the Court.

Mr. Griffin: If your Honor please, I appear for the National Surety Company, the surety on a number of undertakings on appeal for the New York Railways Company.

I appear for the purpose of asking the assistance of your Honor in having inserted in the order appointing the Receiver, or Permanent Receiver, or continuing this receivership, a provision permitting the Receiver to compromise and to settle claims,
3341 and to make such arrangements with regard to bonds to be required on appeals which the Receiver may take, as may be necessary, and to arrange for the payment of premiums on the bonds furnished on those appeals.

I have authority, if your Honor please, for making that request, and I attach to the papers which I have and will file with you the action taken by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in the case of the Railway Steel Spring Company vs. The Missouri, Kansas & Texas Rail-
3342 way Company, where the Court inserted in the order appointing the Permanent Receiver language reading as follows, after giving him directions as to the payment of moneys for the expenses of operation. He then provided:

> "All amounts now or hereafter paid by sureties upon all supersedeas or appeal bonds executed by said sureties without security for the benefit of the defendant Railway Company"

shall be paid,

> "and said Receiver be and he is hereby authorized to execute, in his own name or that of the

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defendant Railroad Company, all necessary appeal, supersedeas, injunction or other bonds which may be required by law or in carrying out this order or any other order of this Court, and to that end, enter into contracts with Surety Companies as sureties on such appeal, supersedeas, injunction or other bonds, and to pay from any funds coming into his hands as Receiver, the reasonable charges of such Surety Companies therefor, as well as any amount they may be required to pay by reason of signing such bonds as surety."

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In the District Court for the Northern District of Illinois, before Judge Carpenter, in the case of The American Steel Foundries Company vs. The Chicago, Rock Island & Pacific Railway Company, a supplementary order was entered by Judge Carpenter there, which reads:

"That the Receivers heretofore appointed by the Court be, and they hereby are, authorized and directed to compromise and settle any action or proceedings or suits now pending or which may hereafter be brought in any court or before any officer, department, commission or tribunal, and to make all necessary payments in compromise of such suits or proceedings, which in the judgment of the Receivers may be for the benefit or advantage of the property in their possession as such Receivers.

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3. That said Receivers be, and they hereby are, authorized in their discretion to compromise, settle or pay, out of the funds from time to time coming into their possession as Re-

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ceivers, all claims against the Railway Company for services rendered or on account of liability for loans, damage or injury, either as to person or property, which might become, through judgment or otherwise, a lien upon the property in their possession as such Receivers."

The National Surety Company, during the year 1918, and up to early in 1919, executed various bonds, and at the time that your Honor appointed
3347 the Temporary Receiver here the National Surety Company was liable and is to-day liable for $127,678.44 on about twenty-four bonds executed on appeals taken to the Appellate Division, the Appellate Term, on various judgments rendered against the company.

The affidavit which the National Surety Company has made has set forth these various facts, and requests that your Honor have inserted in the order a provision reading as follows—that is, the order continuing the receivership:

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"And the said Receiver is hereby directed and fully authorized and empowered to compromise and settle any claims, actions, proceedings or suits now pending and to pay out of the funds coming into his hands all just and legal claims as well as necessary payments in compromise of such claims, actions, proceedings or suits against the New York Railways Company, whether arising or occurring before or during current operation of the railroads, or whether the same be reduced to judgment, or not; also all amounts heretofore, now

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or hereafter paid by the sureties upon all supersedeas or appeal bonds executed by said surety without security for the benefit of the railroads, and said Receiver be and he is hereby authorized and empowered to execute in his own name or that of the defendant New York Railways Company all necessary appeal, supersedeas, injunction or other bonds which may be required by law or in the carrying out of this order or any other order of this court, and to that end, enter into contracts with sureties on such appeal, supersedeas, injunction or 3350
other bonds and to pay from any funds coming into his hands as Receiver, the reasonable charges of such surety companies therefor, as well as any amounts they may be required to pay by reason of signing such bonds as surety."

It is particularly desirable, if your Honor please, that the Receiver shall have that authority, because in the experience which I know the surety companies generally have passed through there has always been more or less difficulty with the arranging of the bonds for the Receivers. 3351

This petition made by the National Surety Company shows that it has received no security for any of these bonds executed, amounting to $127,678.44.

The Court: Mr. Griffin, the situation as to surety bonds, if my memory is right, was dealt with in the Brooklyn Rapid Transit matter by way of an application by the Receiver for instructions, and I would rather not incorporate anything of that character in this order because I regard it as extraneous to this order; but the Receiver will

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take up with you on behalf of your company, the matters to which you have referred.

Mr. Griffin: Yes.

The Court: In due course such appropriate application may be made as the Receiver may be advised for consideration by the Court.

Mr. Griffin: Did these instructions, if your Honor please, include the cases which were then pending, at the time the Receiver took charge?

The Court: The instructions to the Receiver would be to visit the National Surety Company,

3353 per Mr. Griffin.

Are there any other persons desiring to be heard?

Mr. Hyman: If your Honor please, I appear for the Fulton Street Railway Company bondholders.

I do not know whether I ought to be here or not, but in the complaint filed herein as the basis of jurisdiction, there is an allegation that there is pending upon the calendar of this Court a suit growing out of the reorganization of the Metropolitan Street Railway Company, in which it is claimed that the defendant is liable for upwards of one million dollars, and the defendant will be without

3354 means to meet any judgment recovered therein.

I assume that is the suit by the Fulton Street Bondholders' Committee against the New York Railways Company arising out of the former receivership; and with your Honor's permission I would like simply to make a statement at this time without entering a formal appearance, as possible there is a conflict of jurisdiction between the Court under the old receivership proceeding and the present court in regard to this claim.

In the old receivership proceeding the Court reserved jurisdiction over the property sold under

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the foreclosure, and over the cash fund of some six million dollars, to determine the rights of creditors and claimants therein, with the right to take possession, to enforce any decree or order it might make in the premises.

Pursuant to that leave, the Fulton Street Bondholders having a claim of $500,000 and accrued interest, filed a suit in this court to impress a lien upon the property under foreclosure, and also upon this so-called six million-dollar cash fund that was transferred to the New York Railways Company a couple of years ago.

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This suit was attacked both on the ground of jurisdiction and on the ground of the equity of the bill, and Judge Manton last year wrote a very elaborate opinion sustaining the suit.

Consequently it is the claim of the Fulton Street Bondholders that they have granted to them a reserved lien upon the present property, including the six million-dollar cash fund; and that that lien, having attached under the prior jurisdiction of this Court, would be sperior to the rights of the Receiver under the present receivership.

Consequently my sole purpose of coming here is 3357
to advise your Honor of the present situation of that suit, and to suggest, if it be possible, that in your order some account be taken of this possible conflict of jurisdiction, so that no order made continuing the receivership would jeopardize or prejudice the reserved jurisdiction of the Court under the prior receivership orders.

This claim of the Fulton Street Bondholders is that the Metropolitan Street Railway Company had guaranteed the principal and interest of this bond issue, and had operated this Fulton Company

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practically as its own, and under the reorganization no consideration was given to this bond issue, they got back no property, no equipment, no road bed and no franchises, nor were they taken care of in the reorganization.

In consequence thereof the claim is made that these Fulton bonds, amounting to $500,000 and interest, constitute a lien upon the property transferred through the receivership proceedings; and we would like to have such order made, if it is possible, so that nothing will be done herein which

3359 will prejudice or interfere with the reserved jurisdiction of the Court in the prior suits.

If your Honor would so desire, I would like to submit a form of reservation of jurisdiction which I think would answer our purpose, if it be satisfactory to the other side.

The Court: I think we can deal with that at the moment a little more simply. At the conclusion of the proposed order that Mr. Judd has just handed up, there is the following:

> "It is further ordered that any party in in-

3360 terest may apply for further direction."

I have changed that to read:

> "It is further ordered that any party in interest may apply at any time for further direction, and for that purpose the term of the court is hereby extended."

I do not want to pass at this time, either one way or the other, upon your application; but the minutes which record the colloquial statements that are being made will note that I do not pass on

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that matter at this time, either one way or the other, and that either you may make an appropriate motion, when so advised, at any time hereafter, or that the Receiver when he investigates the matter, may make such application as he may be advised; and at your joint convenience you can confer with the Receiver and with such counsel as he may select.

In the meanwhile I will be glad to have your memorandum for my own information.

Mr. Hyman: I returned this afternoon so I have a fragmentary memorandum.

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The Court: That will be perfectly satisfactory.

Mr. Hyman: My remarks may be without appearance on my behalf?

The Court: Certainly. Are there any others who desire to be heard?

Mr. Bouvier: May it please the Court, at the request of a large number of members of the bar representing claimants against the New York Railways Company in a very considerable sum of money, for the formation of a committee in its nature and scope not dissimilar to that which exists with respect to the Brooklyn Rapid Transit Company, there has been pursuant to that request formed a committee consisting of Judge Seabury as Chairman thereof, myself, Mr. Ernest, and Mr. Charles Steckler; and if it meet with the Court's approval I should like the Court to direct that there shall be duly noted on its records the formation of that committee, and that all notices and other papers in the proceeding shall be served upon the Secretary of that Committee.

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The Court: That is Mr. Ernest?

Mr. Bouvier: Yes, sir.

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The Court: And his address is what?

Mr. Bouvier: 38 Park Row.

The Court: Are there any others who desire to be heard?

If not, I will sign the order which has been presented, with the slight change that I have indicated, which is purely one of form, making the appointment of Mr. Hedges permanent pending the litigation.

In addition to the various committees which appeared before me at the time of the application

3365 for the original order, the Corporation Counsel, and the committee to which Mr. Bouvier has referred, have appeared to-day.

In respect of all these committees and of the Corporation Counsel, and of the committee of which Judge Seabury is chairman, the Tort Committee, the Receiver and such counsel as he may select, are instructed to give notice of all proceedings, exactly in the same manner as in accordance with the established practice in the proceedings of the case of the Brooklyn Rapid Transit Company.

I am extremely glad, I am very much gratified

3366 at the attitude of the Corporation Counsel in desiring to assist the Court and the receivership, and all those concerned, in a spirit of co-operation and of constructive effort, in the many problems which are now and doubtless will hereafter be presented to this receivership; and it may not be inappropriate at this time, in view of the fact that two extensive systems are now in the hands of the Court, and that a third company, having to do more particularly with financial matters, is also in the hands of the Court, that the Court might point out briefly some matters to which attention should be directed.

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Without attempting to be accurate, I should say that the matters in hand may be divided into what, for want of a better definition, we might call the legal situation, the traffic situation and the financial situation.

The members of the bar here present and the Court perfectly understand what is frequently understood by laymen, and that is that the matters which ordinarily require first consideration and careful investigation are those matters that revolve around the more or less complicated legal rights which arise in every situation of the character 3368
here disclosed, or of the character disclosed in the case of the Brooklyn Rapid Transit System.

There are security holders of various classes, there are those who hold the stock, there are the creditors. In the transit situation in Brooklyn there is a contract with the City, and various franchise relationships; and in this situation of the New York Railway Company there are various contract relationships in respect of franchise matters.

These all require for a clear understanding the most careful consideration by able and thorough 3369
counsel. The Receiver of course must acquaint himself with these legal problems, or problems of law, as fast as he can, and be aided by competent and highly skilled counsel. In that connection I assume that all counsel, while naturally safeguarding the rights of the interests they represent, will nevertheless fully co-operate with the receiver in endeavoring to make the situations as to the law as clear as possible, so far at least as a statement of what the controversies are is concerned.

I shall be glad indeed to have the assistance not only of counsel who represent the security holders

3370 and the stockholders and any other interests, but also shall welcome the co-operation of the Corporation Counsel and of the Public Service Commission, and shall hope that they will give us their co-operation to the fullest extent.

The second head is the traffic situation. In the situation in Brooklyn we were met at the outset with a considerable amount of dissatisfaction on the part of the public at large with the actual running of the trains and all there was connected therewith.

3371 The Receiver there has devoted himself assiduously to correcting the situation which was first presented, as far as he could. He does not consider that he has attained perfection, and I doubt whether that can ever be attained; but his effort is along the line of giving the people proper transit service.

I have taken pains to endeavor to inform myself as far as I can, from independent sources—by which I mean persons disconnected in any official relation to the subject matters of the Brooklyn Rapid Transit receivership, as to whether or not

3372 that actual service is improved, and I am told by those in whom I have confidence that there has been a very substantial improvement, and every effort will be made to continue.

So in the case here, knowing the point of view of the Receiver from long years of personal acquaintance, and knowing my own point of view, I have no doubt that the Receiver will make every effort to co-operate to the end that there shall be as good a service as circumstances will permit. It is but fair to say that, so far as I have been able to learn, under the management of the officials of

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the New York Railways Company prior to the receivership, there was no substantial complaint in any quarter as to the daily running of the cars which comprise that system. Doubtless every so often there must be some complaint in so vast a system, but no such situation as to daily traffic was presented in the New York Railways situation as was presented, owing to a series of unfortunate events, in the Brooklyn situation. How good the traffic shall be, and how unified it shall be, must depend a great deal upon events and financial conditions. Nobody wants to let that traffic be any 3374
less efficient than it now is if there is any reasonable or proper way of avoiding it.

The question of transfers, to which the Corporation Counsel referred, is of course a matter of great importance and will be dealt with when the time comes, if it does come, only after the most full and careful hearing and consideration. The approach, I think, on the part of everybody, is to preserve the system and its unity if possible; and whether it is possible or not of course depends a great deal upon a number of elements, one of which is the financial situation. 3375

In respect of the financial situation, I have been extremely careful to say nothing upon the much mooted question as to increase of fares. My view of the situation as affecting the whole system, both that which is in this receivership and that which is in the Brooklyn receivership, is that the first thing to do is to get all the facts; to ascertain in a way the verity of which no one can doubt, precisely what is the financial situation, not only what the investments are—which are matters of public knowledge almost, and are on file in public

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offices—but what arrangement would be just and right to give a fair return to investors, while, on the other hand, not involving a return which is disproportionate.

All of that cannot be disposed of out of hand. That all comprises a very difficut subject matter.

In the next place it is important to know from the financial standpoint, and the point of view of expert men, the various values of these roads for all purposes. There is an investigation in hand now in respect of the Brooklyn Rapid Transit
3377 Company by expert men of the highest standing and the greatest experience. A similar investigation will no doubt be had by the receiver of this system.

When all these facts shall have been clearly known and fully understood, then it can be determined what is the right thing to do. If increase of fares on the facts should prove to be unnecessary, we shall all understand that. If increase of fares on the facts should prove to be necessary, after full and free and fair discussion, and thorough inquiry, I am convinced that the public of
3378 New York is so fair and reasonable that they will have no hesitation in making it known that if that is one of the remedies they desire, that remedy shall be adopted.

I speak not just to say some words, but I have a very real conviction, through many years of contact, that [illegible] no fairer public than that of the City of New York, but it is a public which desires to know what the facts are, and any solution of this problem, whether it be a rearrangement of the franchise arrangements as affecting the investors, or in addition or without addition

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thereto, as the case may be, an increase of fares because of increased expenses, or whatever the arrangement may be which fair-minded men will agree is right, is an arrangement that the New York public will fully ratify and support if they are satisfied that it is right.

Therefore, the great problem immediately confronting every one concerned is to make the facts clear, whatever the facts are; and then there will be an elimination of misunderstandings which arise through a failure on the part of the public to understand the facts.

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I do not know the facts, but I hope to know them before we get through.

It cannot be denied that the problem that is here concerned, that is, the so-called transit problem, is one of very great importance to the greater city, and perhaps in a way to other communities. It is a problem which requires approach in a spirit of fairness, with temperate discussion and thorough inquiry. It is a problem which invokes and invites the best judgment that can be found. It is a problem in which nothing can be ultimately accomplished unless there is a spirit of co-operation all round the circle, and understanding between all of those concerned, whether they represent the investment interests, whether they are public officials, or whether they have a duty to perform as a court. We all must understand each other, we all must assume that each is conscientiously endeavoring to approach the solution from his own point of view for the public good and for the preservation of the rights of property; and if the matter is approached in that spirit, what seems now a very difficult problem will be capable of solution.

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because I think I have lived long enough to know that there is no problem of this character that cannot be solved by fair-minded men.

It is therefore with especial pleasure that, in co-operation with the various gentlemen who represent these responsible committees which appeared before me, that I note the attitude of the Corporation Counsel of co-operation and constructive effort. If that principle is carried out by all of us, it may be our privilege to feel some day or another that we have made some contribution to a problem
3383 which concerns very deeply the welfare of the City.

I should not have said so much excepting that I thought the time had come to say something.

Is there any further business before the Court? If not, the Court will adjourn.

Certificate.

The foregoing statement of facts, including the testimony and proceedings in the contempt trial before Judge Mayer, printed herein at page 89 to and including page 820, and beginning at the middle
3384 of page 889 and ending at the middle of page 1128; which were admitted in evidence before me, is in all respects true and correct, etc., and is the whole thereof on the hearing before me and it is hereby settled and approved and it is

ORDERED that the same be filed ~~as part of~~ as a part of the record together with the exhibits therein mentioned to be transmitted to the United States Circuit Court of Appeals on the appeal in the above entitled case.

Dated, ~~April~~ March 25th, 1922.

MARTIN T. MANTON,
United States Circuit Judge.

Certification of Clerk.

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In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

THOMAS D. MCCARTHY, United States Marshal,
Respondent-Appellant.

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United States of America,
Southern District of New York, } ss.:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing ~~is~~ a volume is a correct transcript of the record in the above entitled matter ~~as agreed on by the parties.~~

IN TESTIMONY WHEREOF I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 29th day of ~~December~~ January, in the year of our Lord One thousand nine hundred and twenty-~~one~~ two and of the Independence of the United States the One hundred and forty-~~fifth~~ sixth.

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ALEXANDER GILCHRIST, JR.,
Clerk.

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Order of Substitution.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of January, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.

3389

" LEARNED HAND,
District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
THOMAS D. MCCARTHY, U. S. Marshal,
Respondent-Appellant.

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A motion having been made herein by counsel for the appellant for an order directing that William Hecht as United States Marshal for the Southern District of New York be substituted as appellant of record in this case in place and stead of Thomas D. McCarthy, United States Marshal, the present appellant;

Upon consideration thereof it is

ORDERED that said motion be and hereby is granted.

H. W. R.,
C. M. H.

Opinion of Henry Wade Rogers, C. J. 3391

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

3392

WILLIAM C. HECHT, United States Marshal,
Respondent-Appellant.

Before—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges,

and

" LEARNED HAND,
District Judge.

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JOHN P. O'BRIEN, Corporation Counsel, Attorney for Petitioner-Appellee; Edmund L. Mooney, Charles T. B. Rowe, Russell Lord Tarbox, Frank I. Tierney, of Counsel.

WILLIAM HAYWARD, United States Attorney, for Appellant; David V. Cahill, Special Assistant United States Attorney, of Counsel.

This is an appeal from an order made by one of the Circuit Judges of the Second Circuit on April 29, 1921, sustaining a writ of habeas corpus

3394 sued out in behalf of Charles L. Craig, petitioner, and discharging him from the custody of the United **[1131]** States Marshal for the Southern District of New York.

ROGERS, Circuit Judge: The petitioner, Charles L. Craig, was, during all the times herein involved, and still is the Comptroller of the City of New York as well as a member of its Board of Estimate.

It appears that on October 6, 1919, the peti-
3395 tioner Craig, as Comptroller of the City of New York, addressed a letter to the Hon. Lewis Nixon in reply to a letter which Mr. Nixon had written to the Comptroller inviting him to a conference in respect to the transportation situation in the City of New York. Mr. Craig's letter contained statements which criticised the conduct of the then District Judge Mayer who had appointed a receiver of the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation, and the New York Consolidated Railroad Company. The receiver had taken possession of the assets
3396 of these roads and was operating the railways under the instruction and supervision of the court.

The New York State Public Service Commission for the First District moved the Court for leave to intervene in the suit on behalf of the City of New York. At the same time the City of New York through its Corporaton Counsel, acting pursuant to a resolution of the Board of Estimate and Apportionment applied to the Court for the appointment of Mr. Craig as co-receiver, he being as Comptroller the chief **[1132]** financial officer of the City. The District Judge, Mayer, denied the

motion for a co-receiver at that time without prejudice to its renewal at a subsequent time. Later certain other street railway corporations were also put in the hands of the receiver.

The letter of Mr. Craig to Mr. Nixon above referred to among other things said:

> "Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy 3398
> for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York."

Again it stated:

> "Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief but he made orders which pre- 3399
> clude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.
>
> Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the Municipal authorities the opportunity to ascertain the truth."

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It concluded as follows:

> "It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a con-
3401 test with corporate powers entrenched in darkness and **[1133]** concealment.
>
> The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to The City of New York any representation in these receiverships, rests upon those who procure and are protected by such orders.
>
> As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge
3402 Mayer putting The City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests."

This letter Mr. Craig sent not only to Mr. Nixon but he is alleged to have caused its publication by sending it to the Public Service Commission and to the various newspapers published in the District.

The result was that the United States Attorney

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filed an information charging Mr. Craig with criminal contempt under Section 268 of the Judicial Code. The information set forth the statements in the letter which were alleged to be false, and that Craig had wilfully, knowingly, and unlawfully and contemptuously made them. It alleged that the publication was calculated and intended by him to influence the Court in the consideration of the suit in which the receiver was appointed and in proceedings then pending. It also alleged that the purpose was to intimidate the Court and to force and compel it to decide applications and **[1134]** 3404
questions in issue in accordance with Craig's wishes. It also alleged that the letter was written for the purpose of inciting public ridicule, scorn and condemnation if the Court's decisions were contrary to or at variance with the views and wishes of the defendant. That it tended to obstruct and impede the administration of justice in said suits and proceedings.

A demurrer was interposed which was overruled in an opinion which can be found in 266 Fed. 230, and the defendant was held to answer in contempt before Judge Mayer. 3405

The trial was commenced on May 10, 1920, and was concluded on June 10, 1920. Every consideration seems to have been given to counsel and briefs were not submitted until October 30, 1920, and Judge Mayer reserved his decision until February 14, 1921. He appears to have given great consideration to the questions involved, filing a full and comprehensive opinion, which can be found in

Fed . The opinion concluded as follows:

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"The United States Attorney is directed to submit to the Court, on two days' notice to counsel for defendant, a proposed order in accordance herewith which shall also provide that the defendant shall appear before the Court in Court Room 331, of the Old Post Office Building on February 24, 1921, at 2 P. M., at which time such further proceedings will be had as may be proper.

"The defendant is not only the incumbent of a high office, but is also a member of the bar
3407 of this Court. It is manifestly his duty to do all in his power to repair the wrong he has done **[1135]**.

"It is not a wrong with which the judge concerns himself in a personal sense and for that reason no personal apology is desired nor required. The wrong has been perpetrated against the administration of justice.

"The reparation which is within the power of the defendant is promptly to make and file in the office of the Clerk of the Court an unqualified retraction of the false statements re-
3408 specting the Court, referred to in paragraphs 1, 2, 3, and 4 of the information."

It seems that Mr. Craig was given full opportunity to make retraction of what the District Judge found to be "false charges," the effect of which he also found tended to "obstruct the administration of justice." But Mr. Craig did not avail himself of the opportunity to make the retraction demanded and on February 24, 1921, the United States Attorney moved for sentence and the Court pronounced judgment and sentenced the defendant to be imprisoned for a term of 60 days,,

sentence to be executed at the Essex County Jail, Newark, New Jersey, the Attorney General of the United States having previously designated that as the place of confinement for defendants sentenced in the Southern District of New York for terms of less than six months.

On the same day that sentence was pronounced an application was made to one of the Circuit Judges in this Circuit for a writ of habeas corpus and the writ was signed and issued by him on the same day. It appears that the Circuit Judge who issued the writ had been duly designated by the 3410
Senior Circuit Judge of the Circuit to hold a session of the **[1136]** District Court for the Southern District of New York for the hearing of such business as might come before him during the period between February 21, 1921, and ending March 5, 1921. Whether in awarding the writ he was acting in his capacity as a Circuit Judge or in that of District Judge under the designation referred to seems to be one of the controverted questions in the case.

The petition for the writ was addressed to the Judge as "Circuit Judge of the United States." The 3411
writ of habeas corpus required the production of the defendant before the United States Circuit Judge and is signed by the Judge who placed under his signature the letters "U. S. C. J." and nothing therein is said as to his sitting or acting as a District Judge. The first paragraph of his very comprehensive opinion which can be found in 274 Fed., 177, and which was rendered on April 29, 1921, and in which he sustained the writ and directed the defendant's discharge, was as follows:

3412 "The power of a Circuit Judge to issue a writ of habeas corpus is questioned by a motion to dismiss. I have held heretofore that a Circuit Judge has such power (In re David Lamar, 274 Fed., 160). Nothing has been submitted in this proceeding which causes me to change the views there expressed. Further, at the time of the issuance of this writ, the Circuit Judge sitting, was by assignment empowered to consider matters of original jurisdiction. The application to dismiss the writ for
3413 want of authority to issue the same is denied." **[1137]**

A Judge of the Circuit Court of Appeals is, in our opinion, without power either to grant or to issue a writ of habeas corpus. The Circuit Court of Appeals is a court created by statute and is not endowed with any original jurisdiction. It was established by the Act of March 3, 1891, 26 St. at L. Ch., 517, page 826. It is only a court of appeal. The Act does not in terms grant to this court authority to issue the writ. It is given authority to
3414 "exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases." And the Supreme Court has held that a Circuit Court of Appeals is not authorized to issue original and independent writs of habeas corpus. Whitney vs. Dick, 202 U. S., 132, 137.

If the Circuit Court of Appeals, as such, is without the power is it possessed by a Judge of the court acting solely as such? We are satisfied that he does not possess it. A Judge of the Circuit Court of Appeals, like the Court itself, has no authority except that conferred by statute. And no act of Congress

empowers him to grant or to issue a writ of habeas corpus. Section 751 of the Revised Statutes provides:

> "The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus." **[1138]**

And Section 752 provides:

> "The several justices and judges of the said courts, within their respective jurisdictions, 3416
> shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

The Circuit Courts, referred to in Section 751, were the Circuit Courts established by the Judiciary Act of September 24, 1789, and which were abolished by the Act of March 3, 1911. 36 St. at L. Ch., 231, Sec. 289 (p.) 1167.

The Judges embraced within the language of Section 752 were from 1789 to 1869 the Circuit Justices of the Supreme Court assigned to hold 3417
the Circuit Courts and Judges of the District Court. By Section 2 of the Act of April 10, 1869, the office of Circuit Judge was created, 16 St. at L. (p.) 44, and that Act conferred on the Circuit Judge for his Circuit the same power and jurisdiction therein as the Justice of the Supreme Court alloted to the Circuit. And Section 607 of the Revised Statutes conferred similar authority in the same language, which continued in force until repealed in explicit terms by the Act of March 4, 1911, already referred to and which transferred the powers of the Circuit Court to the District

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Court. The Circuit Court and the Circuit Court of Appeals were two absolutely distinct courts, and a Judge of the Circuit Court and a Judge of the Circuit Court of Appeals were equally distinct. And **[1139]** a Judge of the Circuit Court of Appeals, as such, has never been invested with the power to grant a writ of habeas corpus which was possessed by a Judge of the Circuit Court. And no one of the Judges now constituting the Circuit Court of Appeals is now or ever has been a Judge of the Circuit Court within the meaning of
3419 Section 752 of the Revised Statutes, and no one of them is possessed of the power to grant writs of habeas corpus.

But while a Judge of the Circuit Court of Appeals as such has no power to issue the writ of habeas corpus, a Judge of the District Court has such power by virtue of Sections 751 and 752 of the Revised Statutes hereinbefore set forth. As the Judge when he issued the writ, so called, and granted the discharge had been designated and appointed under Section 18 of the Judicial Code to hold a session of the District Court for the
3420 Southern District of New York for the hearing and disposition of such business as might come before him within the period specified in his appointment, it is clear that he had power to grant a writ of habeas corpus at the time he acted in this matter —provided he acted as a District Judge. As he had jurisdiction sitting as a District Judge and was without jurisdiction if sitting as a Circuit Judge the presumption is that he, in doing what he did, was sitting as a District Judge unless it clearly **[1140]** appears to the contrary. The statement of his belief in the opinion which he filed that he possessed the power to act in his capa-

city as a Circuit Judge is not of controlling significance. Particularly is this so because he also, in the same connection, refers to the fact that in the issuance of the writ he had been empowered to consider matters of original jurisdiction. Whatever doubt one might otherwise entertain as to the capacity in which he was acting at the time seems to be put at rest by the order which he made and which required "that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York," and that they "be recorded in said court." As a Judge of the Circuit Court of Appeals he would not have directed the papers to be filed with the Clerk of the District Court and that they be recorded in that Court, but would have filed them in the office of the Clerk of his own court and ordered them to be there recorded. The order sustaining the writ and ordering the discharge of Craig, and which the Judge ordered recorded in the District Court and which is the order appealed from must be regarded as made by him under his designation to hold the District Court for the Southern District of New York. And as such an appeal from that order was properly taken to this court **[1141]**.

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Before we pass to a consideration of the merits of the case itself we deem it proper to refer to what appears in the transcript under the designation "Writ of Habeas Corpus" but which in reality does not correspond with what we understand to be such a writ. In commenting upon the writ as printed in the present record it is necessary to have in mind the language of Sections 751 and 752 already quoted, and to note the distinction made therein between the power to issue and the

3424 power to grant. Section 751 gives to the *courts* named therein the power to *issue* the writ. And Section 752 gives to the *Judges* of the courts specified the power to *grant* the writ. To grant the writ is to give permission for its issuance. When that permission is given it issues from the court. And when so issued it has the teste of the Clerk as well as the seal of the court. But in the case now before us this so-called writ of habeas corpus does not appear to have issued from any court. No seal of any court is affixed to it. And the
3425 name of the Clerk of no court attests it. The Statute of 31 Car., II, expressly provided that the writ should be under the seal of the court whereof the Judge granting the writ is a member. It is our understanding that a writ of habeas corpus like a writ of error, or a writ of certiorari or a writ of mandamus should be issued under the seal of the court **[1142]**. In the United States the writ always runs in the Federal courts in the name of the President of the United States, and in the State courts in the name of the State or the people. Church on Habeas Corpus (2nd
3426 ed.) Section 110. But in this case the writ did not run either in the name of the President or in that of anybody else. And it was not addressed to the United States Marshal or to anybody else. We, however, do not need now to inquire as to what legal validity the writ originally possessed as it appears to have been treated by all the parties as valid, and no objection was raised concerning it at the argument in this court.

This brings us to inquire as to the use made of the writ of habeas corpus. The object of that writ is to secure the speedy release by judicial decree of persons who are illegally restrained of their

liberty. The writ has long been justly esteemed the great bulwark of personal liberty, since it is the proper remedy to ascertain whether the individual is lawfully deprived of his liberty, and by its means, if no lawful ground of his detention appears, he is entitled to an immediate discharge. In this case the petitioner for the writ had been convicted of a criminal offense, a criminal contempt, and sentenced to imprisonment. He sought to obtain his release and to defeat his conviction and sentence by means of a writ of habeas corpus.

In the important case of Brass Crosby, Lord Mayor of London, 3 Wilson, 188, an application **[1143]** was made in 1771 to the Court of Common Pleas for a writ of habeas corpus to bring up the body of the Lord Mayor of London who had been committed for contempt by the House of Commons. The habeas corpus was granted, and upon the return, the causes of contempt for which the party was committed, were set forth. It was fully argued and at considerable length that the House of Commons had no authority to commit for a contempt; and if they had that power that they had used it wrongfully in that instance and that the causes assigned were insufficient. The whole court decided that the House of Commons had power to commit for contempt; and that the court could not revise its adjudication.[1] Lord Chief Justice,

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[1] In Kilbourn vs. Thompson, 103 U. S., 168, the Supreme Court, which was an action for false imprisonment, considered the power of the Houses of Congress to punish for contempt and pointed out the distinction between the Houses of the English Parliament and the Houses of Congress in this respect. See also Marshall vs. Gordon, 243 U. S., 521 **[1144]**.

3430 De Grey, at the conclusion of the argument stated that if either he or any of his brethren on the Bench, had any doubt about the matter they would certainly have taken time to consider before giving their opinions, but that the case seemed so very clear that there was no reason for delay and they thereupon proceeded to state their opinions. The Chief Justice stated his opinion at some length and in the course of it declared that "when the House of Commons adjudged anything to be a contempt, or a breach of
3431 privilege their adjudication is a conviction and their commitment, in consequence, is execution; and no court can discharge on bail, a person that is in execution by the judgment of any other court. The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this court do? *It can do nothing, when a person is in execution by the judgment of a court having a competent jurisdiction.* In such a case, this Court is not a court of appeal." All four of the Justices agreed and Mr. Justice Blackstone, in his concurring opinion, said "all
3432 courts, by which I mean to include the two Houses of Parliament, and the Courts of Westminister Hall, can have no control in matters of contempt. The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow, if courts could, by writs of habeas corpus, examine and determine the contempt of others."

The above case was approvingly commented upon and its doctrine followed in 1822 by the Supreme Court in Ex parte Kearney, 7 Wheat., 38.

The Court **[1145]** in its opinion, which was written by Mr. Justice Story, after referring to the Brass Crosby case, said:

> "So that it is most manifest, from the whole reasoning of the Court in this case, that, a writ of habeas corpus was not deemed a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction; and that, if granted, the Court could not inquire into the sufficiency of the cause of commitment." 3434

Again: "The only objection is, not that the Court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case." This the Court decided it could do and it denied the writ.

In 1830 in Ex parte Tobias Watkins, 3 Peters 193, the Supreme Court refused an application for a writ of habeas corpus, it appearing that the prisoner was confined in jail by virtue of a judgment of a Circuit Court of the United States which judgment was claimed to be erroneous. Chief Justice Marshall, speaking for the Court, said: 3435

> "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a Court of record, having general jurisdiction over criminal cases. An offence cognizable in any Court, is cognizable in that Court. If the offence be punished by law, that Court is com

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petent to inflict the punishment. The judgment of such a tribunal has all the obligation **[1146]** which the judgment of any tribunal can have. To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full
3437 force unless reversed regularly by a superior Court capable of reversing it."

And the method of reversing the judgment was by writ of error and not through a writ of habeas corpus.

The Supreme Court has consistently adhered to the principle announced in these early cases. Thus in Matter of Gregory, 219 U. S., 210, the Court, where the person applying for the writ had been convicted of a crime in the Police Court of the District of Columbia, Mr. Justice Hughes speaking
3438 for the Court, said:

"In hearing this application, this Court does not sit to review the correctness of the conclusion of the Police Court as to the violation of the statute by the petitioner, or of the decision of the Court of Appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence but simply whether the Court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction the application for a writ of habeas corpus must be denied."

The principle is therefore as thoroughly established as any in the law that in applications for a writ of habeas corpus if it appears that **[1147]** there has been a judgment of conviction the only question to be considered is not whether the judgment was erroneous but whether the Court had jurisdiction to try the issue and to render the judgment. See Ex parte Parks, 93 U. S., 18; Ex parte Yarbrough, 110 U. S., 651; In re Coy, 127 U. S., 731; Gonzales vs. Cunningham, 164 U. S., 612; In re Eckert, 166 U. S., 481; Hyde vs. Shine, 199 U. S., 62, 83; Whitney vs. Dick, 202 U. S., 132, 136; 3440
Kaizo vs. Henry, 211 U. S., 146, 148. And see Harlan vs. McGourin, 218 U. S., 442, 448, where it is said that "Upon habeas corpus the Court examines only the power and authority of the Court to act, not the correctness of its conclusions."

The rule is correctly laid down in 17 Am. & Eng. Encyc. of Law, p. 1059, where it is said: "A conviction and sentence for a criminal offense cannot be collaterally attacked in habeas corpus proceedings for errors and irregularities not affecting the jurisdiction. But if a person is restrained of his liberty under an order or judgment which is 3441
void for want of jurisdiction, habeas corpus will lie."

In Henry vs. Henkel, 235 U. S., 219, decided in 1914, the Court declared that, subject to certain exceptions, it had "uniformly held that the hearing on habeas corpus is not in the nature of a writ of **[1148]** error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the

3442 charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted he has his right of review." Again the Court said:

> "Neither the issue nor the basis of the decision is changed when the person held under the warrant applies to a District Judge for discharge on writ of habeas corpus. So likewise
> 3443 the same issue and the same rule of decision must govern when the case is here on appeal from the order of the habeas corpus tribunal."

This Court in a recent opinion, not yet published, and concurred in by the Judge who entered the order now before the Court on this appeal, United States ex rel Meyer Ripstein vs. James M. Power, has held that a writ of habeas corpus cannot be used to review the weight of evidence but is confined to the single point of jurisdiction. And so in a recent decision of the Court of Appeals in New
3444 York it was declared that habeas corpus only tests the mandate under which the prisoner is held, and is not a substitute for a trial to determine innocence. People vs. Atwell (decided November 22, 1921.) **[1149].**

In Cooley's Constitutional Limitations, page 347, that eminent authority notices the fact that it has sometimes been attempted to be used as if it were a writ of error under which errors and irregularities of other judges and courts could be corrected. He declares:

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"• • • Any such employment of the writ is an abuse. Where a party who is in confinement under judicial process is brought up on habeas corpus, the court or judge before whom he is returned will inquire: 1. Whether the court or officer issuing the process under which he is detained had jurisdiction of the case, and has acted within that jurisdiction in issuing such process. If so, mere irregularities or errors of judgment in the exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the 3446
court issuing the process, or on regular appellate proceedings. • • •"

There are exceptions to the general rule that a conviction and sentence for a criminal offense cannot be collaterally attacked in a habeas corpus proceeding for errors committed upon the trial. The exceptions to that rule are as follows:

1. Where the rights or obligations of the United States under a treaty are involved, or where a subject or citizen of a foreign state and domiciled 3447
therein is in custody by State authority for an act done or omitted the validity and effect of which depend upon the law of nations. See Ex parte Royall, 117 U. S., 241, 251; Cunningham vs. Neagle, 135 U. S., 1, 71, 74; In re Mayfield, 141 U. S., 107; Boske vs. Commingore, 177 U. S., 466; In re **[1150]** Lincoln, 202 U. S., 178, 180-2.

2. Where there is a conflict of jurisdiction between a State and the United States, or where the authority and operations of the Federal Government are or may be interfered with by State

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action. See Tarbell's Case, 13 Wall., 397; Tennessee vs. Davis, 100 U. S., 257; Cunningham vs. Neagle, supra; In re Watts, 190 U. S., 1, 27.

3. Where the petitioner is held under State process based upon a State law, which is in violation of the Constitution of the United States. See Ex parte Royall, 117 U. S., 241, 247-50, 252, 253.

4. Where the judgment or order, under which the petitioner is held is void because in excess of the
3449 power of the court. See Ex parte Lange, 18 Wall., 163, 175-7; Hans Nielsen, 131 U. S., 176; Ex parte Hudgings, 249 U. S., 378.

In the case now before us for decision, great reliance is placed by the petitioner upon the case last cited. We are, however, unable to see that any analogy exists between that case and this. In Ex parte Hudgings, the District Judge, while presiding at the trial concluded, while the witness was on the stand giving his testimony, that he was committing perjury by asserting and reiterating that he could not recall having seen certain persons
3450 write, although he had frequently associated with them. **[1151]**

He testified that he had often seen the writing of the persons named, and thought the writings shown him were theirs, but that he could not so state from having seen them write as he could not recollect ever having seen them do so. The court interrupted the examination by saying:

> "This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying

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falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife. * * *

"And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, 'I do not remember.'"

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The court also said:

"I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court and I am very sure it has, to deal with you in the manner proposed, I am going to do it."

Before the discharge of the witness from the stand an order for contempt against him was made and he was committed to the custody of the marshal.

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The Supreme Court held the commitment *void* for excess of power and therefore ordered the petitioner discharged. It held that perjury in **[1152]** facie curiae is not of itself punishable as contempt apart from its obstructive tendency. It declared that obstruction to the performance of judicial duty resulting from the act done is the characteristic upon which the power to punish for contempt must rest and that the presence of that element

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must clearly be shown, and that false swearing does not necessarily have an inherent obstructive effect. And the court pointed out that:

> "If the conception (that it necessarily had such an effect) were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony
3455 which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

We have referred to this case at length because of its remarkable and exceptional character. The case stands by itself and is properly regarded as sui generis. It affords no precedent for the claim put forward by the petitioner in support of the
3456 order appealed from. In the Hudgings case, without proof of guilt, without any evidence, without any hearing, the court forthwith ordered the imprisonment of the witness for an indefinite term until he should purge himself of the alleged contempt by testifying flatly the reverse of what he had stated to be the truth. In the instant **[1153]** case the District Judge certainly did not proceed summarily in imposing sentence upon the petitioner, as in the Hudgings case, inasmuch as about 17 months intervened between the commission of the act of contempt and the issuance of an order of commitment, while in the Hudgings case before the

witness had left the stand he was committed to the custody of the marshal. In the present case sentence was imposed at the end of legal proceedings of a thorough and deliberate nature, and in which the fullest inquiry was made into all the facts including the question as to whether the publication complained of tended to obstruct the administration of justice and the Trial Court found as a fact that the tendency and effect of the publication were to obstruct the administration of justice. The testimony taken at the trial covers 600 printed pages, and 100 pages more are taken up with the exhibits. Moreover, we may point out that what was done in the **[1154]** Hudgings case was done at least by a court empowered to review and set aside erroneous judgments in appropriate proceedings, while in the instant case it was done by a single judge clothed with no authority to revise or set aside erroneous judgments except when acting with those associated with him in the court of which he is a member. In granting the writ and discharging Craig he was acting alone and as a District Judge and his authority was exactly coextensive with that possessed by the Judge whose action he sought to exercise appellate jurisdiction over and whose errors he assumed to sit in judgment upon and to correct. The two cases thus present a marked contrast, and the one affords no authority for the other.

We do not find it necessary to review in detail the other cases relied upon by the petitioner. It suffices to say that the cases will be found to fall within the exceptions to the general rule heretofore stated in this opinion and therefore inapplicable to the facts of the case under consideration.

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We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ of error but must be **[1155]** limited to jurisdictional questions. The procedure before Judge Mayer was in conformity with settled practice with respect to the subject matter of which the District Court had jurisdiction. No question of international law or of treaty obligations was involved; there was no conflict in jurisdiction between the State and Federal authorities; there was no State interference with the operations
3461 of the general government; the constructionality of no State law was assailed; the power of the Court under Section 268 of the Judicial Code was not exceeded.

This examination of the cases shows that the sole question which could be considered in the habeas corpus proceedings was as to the jurisdiction of the District Judge. If he had jurisdiction of the person of the petitioner Craig, and jurisdiction of the subject and authority to render the judgment which he pronounced, there was no right to inquire further in the habeas corpus proceed-
3462 ings, and no right to determine whether or not, in the exercise of that jurisdiction, the District Judge had committed error. If errors were committed, the law afforded a remedy therefor but not by habeas corpus.

So that the question therefore narrows itself down to this—did Judge Mayer have jurisdiction to render the judgment he pronounced upon Craig? **[1156]**

To render the jurisdiction of a Court complete, it must have jurisdiction over the subject matter, and over the person if the action is in personam as

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in the present case. Jurisdiction of the subject matter is the power to deal with the general subject involved in the action. In other words, the Court must have cognizance of the class of cases to which the one to be adjudicated belongs. And the subject matter concerning which we must inquire is as to the right of the District Court to punish for a contempt of its authority. The right of every superior Court of record to punish for contempt is inherent from the very nature of its organization, and is essential to its existence and protection, and to the proper administration of justice. Anderson vs. Dunn, 6 Wheat., 204; United States vs. Hudson, 7 Cranch, 32; Ex parte Kearney, 7 Wheat., 40; in ex parte Robinson, 19 Wall., 505, the Court said:

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> "The moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

And in Blackstone's Commentaries, vol. 4, page 286, the great English commentator wrote:

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> "Laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the Supreme Courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. **[1157]** Accordingly, we find it actually exercised as early as the annals of our law extend."

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A United States District Court is a Court of record of superior jurisdiction within the rule above stated, and as such it has, irrespective of statute, an inherent power to punish for contempt.

An Act of Congress, declaratory of the law, has expressly provided as follows:

> "The said Courts (United States Courts) shall have power * * * to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority; provided, that
3467 such power to punish for contempts shall not be construed to extend to any cases, except the misbehaviour of any person in their presence, or so near thereto as to obstruct the administration of justice * * *." The Judicial Code, Section 268 (36 St. at L., 1163).

It cannot be claimed, therefore, that the District Court was without jurisdiction of the subject matter of the contempt.

Conduct that is directed against the dignity and authority of a Court constitutes a criminal con-
3468 tempt of the Court. And it has been held that a publication, pending a trial, which reflects upon the Court, counsel, parties or witnesses, respecting the cause, constitutes a contempt. Hollingsworth vs. Duane, 12 Fed. Cas., No. 6,616; United States vs. Duane, 25 Fed. Cas., No. 14,997; In re Bronson, 12 Johns. (N. Y.), 460; Bloom vs. People, 23 Col., 416; People vs. Wilson, 64 Ill., 195.

Courts of record of superior jurisdiction **[1158]** possess inherent power to punish for contempt of Court. Middlesex Sheriff's case, 11 A. & E., 273; Rex vs. Davison, 4 B. & Ald., 329; Rhinehart vs.

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Lance, 43 N. J. L., 311; Cartwright's case, 114 Mass., 230; In re Chadwick, 109 Mich., 588; Tyler vs. Hamersley, 44 Conn., 393; Coleman vs. Roberts, 113 Ala., 323; Bradley vs. State, 111 Ga., 168; In re Rosenberg, 90 Wis., 581. The existence of such a power in the Court is essential to the due administration of justice.

It is equally clear that the Court had jurisdiction over the person of Craig. Jurisdiction of the person is acquired either by the service of process within the territorial limits of the jurisdiction upon the defendant personally, or by his voluntary appearance either in person or by attorney. It appears that Craig was duly served with process, and it is not necessary to inquire further. But as a matter of fact, he appeared also by counsel and personally. He entered a plea of not guilty and testified on his own behalf, and his testimony alone occupies 150 printed pages of the record.

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The judgment imposed—imprisonment for 60 days—was within the Court's jurisdiction. For the Section of the Judicial Code already set forth expressly declares that the Court shall have power to punish "by fine or imprisonment" in its discretion. **[1159]**

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The fact that the person involved happens to be an officer of a great municipality and as such is charged with heavy responsibilities does not affect the question presented to this Court and which must now be decided. So far as the question of law now presented to this Court is concerned, his status is not different from that of the humblest individual in the land. The law is no respecter of persons and no man can obstruct or interfere with the administration of justice in the courts.

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The legal question involved in these proceedings is not to be obscured by confusing the issue which is now presented to us by any discussion concerning whether the Court below in the exercise of its jurisdiction committed errors which the law required the correction of by other methods than the one which was adopted. And we think the question now presented must be determined without reference to whether the time has gone by within which a writ of error might have been taken. That has nothing to do with the question which we have

3473 to decide.

Moreover, if this Court is in error in the conclusion at which the majority of the Court has arrived, it is by no means impossible that the Supreme Court can correct any mistake we may have made.

The order appealed from is reversed and the appellee is remanded to the custody of the appellant. **[1160]**

Indorsement.

UNITED STATES CIRCUIT COURT OF

3474 APPEALS,

SECOND CIRCUIT.

In the Matter
of
CRAIG.

(Copy)

OPINION.

ROGERS,
Circuit Judge.

Filed May 22, 1922. **[1161]**

Concurring Opinion of Charles M. Hough, C. J. 3475

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

WILLIAM C. HECHT, United States Marshal,
Respondent-Appellant.

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HOUGH, C. J. (concurring):

Substantially as to reasoning, and wholly in result, I agree with Rogers, J. This memorandum is filed to emphasize my view that the order appealed from must be set aside because (1) it is but a part of a void proceeding; but (2) even assuming a valid procedure, the Court below exceeded its power in *habeas corpus.* 3477

As to the first point:—the paper writing upon which this proceeding rests is not a writ of *habeas corpus.* A document to be entitled to the name of writ must be issued by a Court and be returnable to the same; it must be under seal and tested by the proper officer. The writing that initiated this matter was no more than the personal direction of a single Judge.

Habeas corpus is but one of the writs well known in a practice regulated by the legislature but originating **[1162]** in, and interpreted by the rules of the common law.

3478 The requisites of a valid writ are stated in *Re Kaine,* 14 How., at page 119. The so-called writ in this instance was a nullity as much as would be a document similarly formed and called a writ of *venditioni exponas* or other familiar process.

I entirely agree with the remarks of Rogers, J., in respect of the power, or lack of power of a Circuit Judge to grant, issue or allow genuine writs of *habeas corpus.*

While, therefore, I regard the proceedings below as merely null, I join the rest of the Court in con-
3479 sidering the matters argued, as though a Circuit Judge duly qualified to hold, and holding a District Court had allowed a writ of *habeas corpus* to issue out of that Court and (upon the return of said writ) directed the relator to be discharged.

As to the second point above stated:—the general rule expressed in all the cases is undoubted, viz.: that *habeas corpus* cannot be treated as a writ of error; the scope of its inquiry is limited to an investigation of the jurisdiction of that tribunal or magistrate or other person whose action, order, judgment, sentence or decree has resulted in depriv-
3480 ing the relator of liberty.

It follows that upon hearing on return of writ, after any trial or equivalent proceeding, the Court acts after "taking the recited facts as conclusive truth" (*Re* **[1163]** *Savin,* 131 U. S., 267, at p. 276), and the only facts that can be shown by the relator by way of traverse, are those "not contradicting the record (which) prove lack of jurisdiction" (*Re Cuddy,* 131 U. S., 208).

This limited investigation the appellee herein deliberately chose; for he might have brought a writ of error and procured the full review of both law and facts fully illustrated by the history through all

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the Courts of *Toledo, etc. Co.* vs. *United States*, 247 U. S., 402.

It follows, therefore, that the first legal inquiry in this case is,—What is meant by jurisdiction?

That the word is plastic in the usage of the Supreme Court of the United States is certainly true; it must be admitted that where an examination of the record shows "no legal evidence to sustain a conviction" lack of jurisdiction exists (*Re Watts*, 190 U. S., 1); and where deprivation of liberty results from an excess of judicial power there is a similar lack. (*Re Hudgings*, 249 U. S., 378). 3482
But always the Court when considering a *habeas corpus* must take the record for verity except in so far as new matter attacks the jurisdiction of the sentencing Court.

There is no new matter in this record attacking jurisdiction; what really happened was that the case was tried over again, and the so-called writ was no more than a device for obtaining a new trial.

I take the record as binding upon the following vital point, viz.: the allegations of the information must **[1164]** be held to be true and the like 3483
assumption also made that what this appellee did, said and wrote was done wilfully and with the wrongful purposes charged by the indictment.

Thus there remains but one question—is it possible in point of law (not in point of fact, that is settled for us by the original findings) for the wrongfully intended acts of the appellee to constitute an "obstruction to the administration of justice?"

Neither this Court nor the Judge presiding upon a return in *habeas corpus* is or was entitled to answer this question as one of fact: and this Court

3484 has not, and the lower Court had not any right to review the facts and render a verdict of not guilty on the ground that the action of the appellee would not practically obstruct the alministration of justice.

We are bound to consider no more than the single question, whether such conduct with such intent could in point of law obstruct the administration of justice. It is my opinion that this question is answered in the affirmative by *Toledo, etc., Co.* vs. *United States, supra.*

3485 Therefore I think the order complained of should be reversed (1) for the nullity (not the irregularity) of the so-called writ; and (2) because had the process been proper, *habeas corpus* did not justify the inquiry upon which the lower Court embarked. **[1165]**.

Indorsement.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

3486

In the Matter

of

CHARLES L. CRAIG, &c.

OPINION.

HOUGH, Circuit Judge (concurring).
Filed May 22, 1922 **[1166]**

Dissenting Opinion of Learned Hand, D. J. 3487

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In Re
CHARLES L. CRAIG.

LEARNED HAND, D. J. (Dissenting): The appealability of the order is settled already and with it appears to me to go the question whether it was 3488
an order of the District Court, since otherwise this Court would have no jurisdiction. Therefore, the questions are, what matters does the writ of habeas corpus review, and what are their merits?

All the books agree that the writ goes only to points of "jurisdiction," so that if that word were definite there would be no doubts. Unhappily, it is not. Generally it means that the offense which the Court decides to have been committed was one which it had power to determine. That is probably the exclusive original meaning. Ex parte Watkins, 3 Peters, 192; Ex parte Kearney, 7 3489
Wheat., 38; Ex parte Parks, 93 U. S., 18. If so, it is enough that the Court has said that it was punishing an offense within its powers; the question is not open whether there was any basis in fact for such an assertion.

Yet this is certainly not without exception the law in Federal courts. For example, it was in post-bellum times repeatedly held that when the Court was acting under an unconstitutional statute, the writ might raise that question. Ex parte Siebold, 100 U. S., 371; Ex parte Clarke, 100 U. S., 391; Ex parte Yarbrough, 110 U. S., 651; Ex parte

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[1167] Royall, 117 U. S., 241; In Re Coy, 127 U. S., 731. In Ex parte Royall, supra, the matter was squarely put as one of discretion. Recently the cases have declined to consider the unconstitutionality of the statute in this way, probably because of the increasing business of the Supreme Court, In Re Lincoln, 202 U. S., 178, Ex parte Spencer, 228 U. S., 652; Henry vs. Henkel, 235 U. S., 219; Glasgow vs. Meyer, 225 U. S., 420. The last cases in which the merits were in any respect considered were Matter of Heff, 197 U. S., 488,

3491 and Matter of Gregory, 219 U. S., 210.

Again, it is settled that when a State tries unlawfully to interfere by criminal prosecution with the activities of the United States, a Federal court may intervene in its discretion by habeas corpus. Prosecutions in State courts for perjury in Federal proceedings are within this rule, Ex parte Bridges, 2 Woods, 248; In Re Loney, 134 U. S., 372. In the same class are In Re Neagle, 135 U. S., 1, and Boske vs. Commingore, 177 U. S., 466. These are frankly cases where the conviction was for a crime over which the Court below had jurisdiction in

3492 the usual sense, just as much as in the case of an unconstitutional statute.

There seems to be no fixed rule to tell what errors of the Court below will be treated as jurisdictional, e. g., Ex parte Lange, 18 Wall., 163. An extreme case is Hans Nielsen, Petitioner, 131 U. S., 176, a case of very doubtful authority in view of Ex parte Bigelow 113 U. S., 328, and In Re Belt, 159 U. S., 95, unless it be confined to cases arising in territorial courts, which hardly seems a valid distinction. In Ex parte Bain, 131 U. S., 1, the error of amending an indictment was treated as juris-

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dictional. Obviously the distinction between the formal jurisdiction of a Court and the regularity of its procedure is not rigid. **[1168]**

The upshot of it seems to me to be that while in general the writ will not be used as a substitute for a demurrer, Ex parte Watkins, supra; Ex parte Parks, supra; In Re Coy, supra; Hyde vs. Shine, 199 U. S., 62, 82, or for a demurrer to the evidence, Harlan vs. McGourin, 218 U. S., 442, yet when large public interests demand immediate action it may. Even then it is clear that the review is limited to whether there was any basis on the facts as found for the action reviewed, Ex parte Terry, 128 U. S., 289, 305, 306; In Re Debs, 158 U. S., 564, 600. The appellant's attempt rigidly to classify these exceptions appears to me more definite than the books warrant. A safer rule is to say somewhat vaguely that they must be occasions of pressing necessity.

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The law seems to be decidedly more liberal in contempt cases, no doubt because of their summary character and liability to abuse. With the exception of Ex parte Kearney, supra, I have found no case in the Supreme Court which refused to consider the merits, at least, to determine whether the offense was in fact within the statute of contempts (Sec. 268 of the Judicial Code). That case turned on the privilege of a witness against self-incrimination, and if the privilege in fact existed the Court was in error for committing the witness. It was possible to say that the privilege destroyed jurisdiction, just as the appellee here argues of Craig's supposed privilege; indeed, that would have been no stronger than Hans Neilsen, Petitioner, supra. But very few cases have gone

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3496 as far as that. Certainly it can be said that the decision is not an authority against the appellee here in so far as concerns an examination of the existence of those facts on which the Court's power was defined, because in Ex parte Kearney, supra, no one questioned that the witness had refused to answer. Moreover, the case was decided before 1831, when the common-law powers **[1169]** of the Court were first limited by the proviso of Section 268.

In Savin, Petitioner, 131 U. S., 267, and Cuddy, Petitioner, 131 U. S., 280, both decided at the same
3497 time, the question was considered whether the misconduct in fact obstructed justice although the relator was unsuccessful in each case. In Cuddy's case it was expressly said (page 286), that had the facts shown that he was not guilty he would have been discharged. There appear to have been no exceptional circumstances to justify a recourse to habeas corpus as against the more usual methods.

In Re Watts & Sachs, 190 U. S., 1, turned on whether the relators had in fact violated the order of the bankruptcy court. This point was examined and the relators released. It is true that there was
3498 a conflict between State and Federal authority, but there was no occasion to vindicate the Federal authority since the District Court had already done so, and indeed, if I may use the phrase, overdone so.

In general, it is well settled that the writ will lie when the conviction is for violation of an order which the Court had no power to make, Ex parte Rowland, 104 U. S., 604, Ex parte Fisk, 113 U. S., 713, In Re Ayres, 123 U. S., 443, In Re Reese 98 Fed. R., 984; Ex parte Robinson, 144 Fed. R., 835. The appellant answers these by saying that

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a void order cannot be the basis of any action, but that begs the question. That precise argument applies equally to unconstitutional statutes, yet it is now settled, as I have said, that generally it is not enough that the statute under which the Court acts is unconstitutional; that point must ordinarily be raised by writ of error. Though the order be void whose violation is punished, it would have been as easy to say, as in Re Lincoln, supra, for example, that the Court was engaged in punishing an offense over **[1170]** which it concededly had jurisdiction in the stricter sense, and that therefore the review must be by writ of error. The cases are clear authority for the proposition that habeas corpus will, at times anyway, examine whether the underlying facts necessary to the commitment exist.

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Cuyler vs. Atlantic etc. Co. (In Re Daniels), 131 Fed. R., 95, though only a decision of a Circuit Judge, is squarely in point, and the ruling in this respect is not affected by the fact that on the merits it conflicts with Toledo Newspaper Co. vs. U. S., 247 U. S., 402.

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In Ex parte Buskirk, 72 Fed. R., 14 (C. C. A., 4th), the contempt punished had been for violation of a stipulation, and the relator was discharged on habeas corpus. The case is analogous to Ex parte Rowland, supra, and its fellows just above cited.

But the most recent, and I think an entirely apposite case, is Ex parte Hudgings, 249 U. S., 378. There the question was the same as here, and in Savin, Petitioner, supra, i. e., whether there had been misbehaviour obstructing the administration of justice, and the Supreme Court examined the

3502 question on the facts to ascertain whether the cause was within the Court's jurisdiction. It recognized that the usual course was by writ of error, but thought that the circumstances justified an exception in that case. Its reasons for so thinking are to be found on page 384 as follows: "In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of Courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness
3503 in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception." **[1171]**

This case therefore very clearly turned on a question of discretion and that a question of no greater public importance than here. Not only does the case at bar arise from a controversy between a Municipality and the District Court, but the result of the Court's order was to imprison Craig for sixty days. He is the chief financial officer of a city of six million inhabitants and his
3504 enforced absence from his duties was presumptively a matter of public concern, quite independent of any interests of his own. Its enforcement would in the nature of things be likely to arouse public feeling and to have an importance altogether greater than that of a private person. If the freedom of witnesses called to court justified an exception, it seems to me that the case at bar must do so. Finally, it should be remembered that before Toledo Newspaper Co. vs. U. S., supra, the law had been much misunderstood, and if that case was rightly interpreted in the District Court the pow-

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ers of a judge in contempt have a scope which, so far as I can see, is scarcely distinguishable in final result from contempt at common law. If so, it is of added importance that this should be understood with as little delay as possible, because nothing can more nearly touch the liberty of the citizen. Prosecution for contempt may be and generally is summary beyond any other; the fact that it was not summary in the case at bar is immaterial. If the citizen is liable to its impact, whenever he animadverts upon a judge before whom no decision is presently pending which his language can 3506
affect, no one can deny that the question is of high moment. I cannot therefore doubt that the Circuit Judge had the power in his discretion to issue the writ and to determine whether there was any basis in fact for the commitment. **[1172]**

It is quite true that recourse to so exceptional a remedy ought to be rare when the judge issuing the writ is of co-ordinate jurisdiction with the committing court, especially here, since Craig had not been denied his release pending writ of error. What may be urgency enough for the Supreme Court, is not necessarily the same for one District 3507
Judge in reviewing another. Indeed, if the time had not long since expired within which a writ of error could be filed, I should be disposed to reverse the order on the ground that though permissible the writ was not necessary to accomplish justice, and should not have been granted. Nevertheless, this consideration does not go to the power to issue it, nor generally to the considerations which make the case an exception, but rather to the propriety of its issuance by a single judge. It seems to me an answer that if the writ now fails, the relator

3508 will lose, by a mistake in his remedy, any opportunity to review the case in any court. In view of this supervening situation I think we should ignore the objection, and treat the case as though the application had been originally made to an appellate court.

The question upon the merits is whether the letter obstructed the administration of justice. The information alleged that it tended and was intended to influence the court in the consideration of the receivership proceedings, to intimidate the
3509 Court and to compel it to decide future questions as the relator wished, and to obstruct the Court's orders in such suits. As the case comes up after conviction, I think that the relator's intent must be taken as proved, but nowhere in the information or the evidence does it appear what future decisions the letter would in fact have influenced. Apparently there was nothing pending **[1173]** at the time and so far as appeared nothing imminent on which the Court was to act.

It is true, we can see from the record that there were certain matters which might, and probably
3510 would, come before the court, arising between the City and the railways. The City was a large investor and had very large claims against the roads. It was at least possible that disputes might arise as to their allowance when the property was disposed of. It was also possible that under the leave reserved, the City might again apply for a co-receiver, though nearly nine months had passed and two other receiverships had been granted without any such renewal. Although it does not appear in the record, perhaps I should also assume that there would be other matters arising in

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the receivership, all of which must come before the same judge and which would involve the City's interests.

Therefore the case presents the question whether the possibility, and if one likes, the probability, that such questions would come up coupled with the intention to influence the Court if they did, was enough to bring the letter within Section 268. I agree with the suggestion of Judge Denison in Toledo Newspaper Co. vs. U. S., 237 Fed. R., 986, 990, that there may be no absolute necessity that the utterance should affect a case actually pending. Thus if one should threaten a judge with personal injury, if he did not decide a case in a given way, it would be a contempt though the case was not yet filed. The rule does not depend upon formalities. Conversely, I think it makes no difference here that the possible proceedings which might be affected would arise procedurally in the same suit. They would be as little and as much influenced as though they came up by independent proceedings. The **[1174]** point as I view it is the proximity of the result to the misbehaviour.

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In the somewhat analogous case of obstructing the draft the Supreme Court laid down the rule that the words must constitute "clear and present danger," that the evil will result, Schenck vs. U. S., 249 U. S., 47, 52. In Frohwerk vs. U. S., 247 U. S., 204 and Abrams vs. U. S., 250 U. S., 616, the rule was not repeated and the element of intent was emphasized but the effect of the words was none the less immediate and I do not understand that the earlier test was repudiated. I cannot suppose, for example, that it would make the abuse of a judge for a past decision a contempt to

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3514 show that the utterer intended generally to intimidate the judge, should a similar case arise in the future, if it was uncertain whether it would in fact arise or when. If the words do not themselves refer to the future, the circumstances surrounding their utterance must be such as immediately to cause the evil which the statute seeks to suppress. A merely possible result, though intended, does not seem to be to me enough. As was said in Schenck vs. U. S., supra, "it is a question of proximity and degree."

3515 For instance, it is common enough for newspapers to criticize very severely even the decisions of the Supreme Court, and everyone agrees that this is not unlawful. Suppose it be shown that it is the purpose of the editors to influence the Court in future cases of that general character, by showing that the decision meets with popular disapproval. Probably that is often the intent. I cannot suppose that immunity depends upon the absence of any such purpose. If so, the editors stand in more peril than I believe they suppose. Rather, as it seems to **[1175]** me, it must be shown either

3516 that the words refer to future decisions and constitute in substance a threat, or that owing to the immediacy of some case, they in fact constitute an immediate intimidation. Usually I believe the decision to be affected must be one which is already sub judice, but, if not, it must be one to whose unbiased determination the utterance is a "clear and present danger."

Nor does the distinction seem to me without a sound basis in policy. It is in small encroachments upon the right of free criticism of all the acts of public officials that the real danger lies. If

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a judge may punish those who indirectly interfere with possible decisions, remote in time, when the force of the present obloquy has been spent, the line between that and punishment for unseemly or false comment upon past decisions becomes so shadowy as in application to disappear. It will in effect be practically impossible to show that the utterer did not have in mind the future effect of his words upon similar cases in the future. Especially in this case if there be added the doctrine that all men are charged with those results of their conduct which are to be reasonably apprehended.

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Hence I cannot agree that the intent which I must accept as proved in the case at bar takes the letter out of the class of comment, which whether or not defensible morally, is immune from summary punishment by contempt. It seems to me beyond such prosecution in the interest of free discussion, regardless either of its temper or even of its truth. As to such injuries a judge in company with all other public officials has no higher protection than a private person. Indeed, the letter strikes me as indistinguishable from the common instance of a disappointed suitor who vents his spleen upon the judge, with a disregard of truth, I assume that generally such a one has it in his **[1176]** mind to teach the judge a lesson, which he expects that his interest if not his conscience may be able to understand. Nor does the fact that the letter was false, while it greatly affects the moral quality of the act, determine its criminality. It is punishable only if it interferes with justice, and in that respect truth is harder to meet than falsehood.

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The case of Toledo Newspaper Co. vs. U. S., supra, does not touch the point at all. It finally

3520 determines that the test of the proximity (nearness) of the misbehaviour is casual, not spatial, but that is all. The utterances there were by their terms directed towards a matter actually sub judice, and the danger was "clear and present" if any danger could be. There was no intimation that any statements were not only not then pending, but, if and when they arose, remote in time.

The writ was not sealed and was irregularly tested, but those are procedural irregularities only. After return regularly made it is too late to raise
3521 them now. They were curable at any stage.

I think that the relator was properly discharged and that the order should be affirmed. **[1177]**

Indorsement.

UNITED STATES CIRCUIT COURT
OF APPEALS,

SECOND CIRCUIT.

3522

In Re CRAIG.

(Copy)

DISSENTING OPINION.

LEARNED HAND, D. J.

Filed May 22, 1922 **[1178]**

Order for Mandate Before Amendment.

3523

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of May, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
Hon. CHARLES M. HOUGH,
Circuit Judges.
Hon. LEARNED HAND, District Judge.

3524

In the Matter
of
CHARLES L. CRAIG,
Petitioner,
WILLIAM C. HECHT, as United States Marshal,
Appellant.

3525

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the

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order of said District Court be and it hereby is reversed and the appellee is remanded to the custody of the appellant.

H. W. R.,
C. M. H.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree. **[1179]**

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Indorsement on Order.

UNITED STATES CIRCUIT

COURT OF APPEALS,

SECOND CIRCUIT.

In re C. L. CRAIG.

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ORDER FOR MANDATE.

United States Circuit Court of Appeals,
Second Circuit.

Filed May 31, 1922.

William Parkin, Clerk. **[1180]**

Order to Show Cause.

3529

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

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WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant.

Upon the annexed affidavit of Edmund L. Mooney, verified June 19th, 1922, the copy of the order for mandate entered and filed herein in the office of the Clerk of this Court on May 25, 1922, and the proposed order resettling and amending the said order of mandate;

LET the respondent-appellant or his attorney, 3531
the United States District Attorney for the Southern District of New York, show cause before this Court at the Chambers of Honorable Henry Wade Rogers, Senior Circuit Judge for the Second Circuit, in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 26th day of June, 1922, at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard why the order for mandate made, entered and filed herein in the office of the Clerk of this Court on May 25, 1922, should not be resettled and amended as follows:

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In the first paragraph of the said order by striking therefrom the words "from the District Court of the United States for the Southern District of New York" and **[1181]** in lieu thereof inserting the words "from the order of Honorable Martin T. Manton, Circuit Judge of the United States, filed with the Clerk of the United States District Court for the Southern District of New York, April 29th, 1921, and recorded in said Court."

In the second paragraph of said order by striking therefrom the words "from the District Court
3533 of the United States for the Southern District of New York," and inserting in lieu thereof the words "certified by the Clerk of the District Court of the United States, Southern District of New York."

In the third paragraph of the said order by striking therefrom the words "the order of the said District Court" and inserting in lieu thereof the words "the said order of Honorable Martin T. Manton, Circuit Judge of the United States."

In the fourth paragraph of said order by striking therefrom the words "to the District Court in accordance with the decree" and in lieu thereof
3534 inserting the words "in accordance with this decree to said Circuit Judge."

And for such other and further relief as to the Court may seem just and proper in the premises.

Sufficient reason appearing therefor, a copy of this order and the papers upon which it is granted, served upon the attorney for the respondent-appellant on or before the 20th day of June, 1922, shall be deemed due and sufficient service thereof.

Dated, New York, June 20, 1922.

HENRY WADE ROGERS,
United States Circuit Judge,
Second Circuit. **[1182]**

Affidavit of Edmund L. Mooney. 3535

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

CHARLES L. CRAIG,
Petitioner-Appellee,

3536

WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant.

United States of America,
Second Judicial Circuit,
Southern District of New York, } ss.:

I, Edmund L. Mooney, being duly sworn, say:

I am special counsel with the Corporation Counsel of the City of New York, attorney for the petitioner-appellee, Charles L. Craig, in the above entitled proceeding. 3537 On May 25, 1922, there was made and entered and filed in the office of the Clerk of this Court an order for mandate, a copy of which is annexed hereto and made a part of this affidavit.

That said order for mandate as signed, recites that the appeal is from the District Court of the United States for the Southern District of New York. Further, that the cause came on to be heard in this Court on the transcript of record from the District Court of the United States for the Southern District of New York, and in the paragraph of the order for mandate decreeing a

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reversal, the order appealed from is described as an order of said District Court. **[1183]**

The proceeding which resulted in the order appealed from was before the Honorable Martin T. Manton, United States Circuit Judge (fols. 2605-2607). The endorsement of the Record itself is merely "Transcript of Record."

The Petition for Appeal prays for leave to appeal from

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> "The final order made and entered herein by the Honorable Judge Martin T. Manton, Circuit Judge of the United States on the 29th day of April, 1921, sustaining the writ of habeas corpus," etc. (Record, fols. 1-3).

The order allowing the appeal herein describes the order appealed from as follows:

> "From the order made and entered herein on the 29th day of April, 1921, sustaining the writ of habeas corpus," etc. (fols. 10-12).

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The citation on appeal describes the order appealed from as follows:

> "Final order of the Honorable Martin T. Manton, Circuit Judge of the United States" (fols. 13-15).

The Assignment of Errors referring to the order appealed from states:

> "The said Judge erred in making the order sustaining the writ of habeas corpus herein and discharging the said Charles L. Craig," etc. (Assignment of Errors, VII).

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It also appears that the order itself, that is, the order appealed from, is signed "Martin T. Manton, United States Circuit Judge" (Record, fols. 93-95).

The record of the contempt proceedings before United States District Judge Mayer was admitted and marked in evidence by counsel for the petitioner-appellee as part of the proceeding which resulted in the order appealed from. That is to say, that in the habeas corpus proceeding before United States Circuit Judge Manton, a stenographic trans-
[1184] script of all of the testimony taken and all of the exhibits, both the Government's and the 3542
petitioner's in the contempt proceedings were offered and received in evidence in the proceeding before United States Circuit Judge Manton (fols. 2639-2640).

The order for mandate herein as entered and filed on May 25, 1922, was drawn and entered by the Clerk of this Court. I am making this affidavit in support of an application to amend and resettle the said order for mandate in the following respects:

In the first paragraph of the said order it is submitted that the words "from the District Court 3543
of the United States for the Southern District of New York" should be stricken therefrom and in lieu thereof should be inserted the words "from the order of Honorable Martin T. Manton, Circuit Judge of the United States, filed with the Clerk of the United States District Court for the Southern District of New York, April 29th, 1921, and recorded in said Court."

In the second paragraph of said order there should be stricken therefrom the words "from the District Court of the United States for the South-

3544 ern District of New York," and inserted in lieu thereof the words "Certified by the Clerk of the District Court of the United States, Southern District of New York."

In the third paragraph of the said order there should be stricken therefrom the words "the order of the said District Court" and inserted in lieu thereof the words "the said order of Honorable Martin T. Manton, Circuit Judge of the United States." **[1185]**

In the fourth paragraph of said order there
3545 should be stricken therefrom the words "to the said District Court in accordance with this decree" and in lieu thereof should be inserted the words "in accordance with this decree to said Circuit Judge."

A proposed form of an order resettling and amending the order for mandate entered herein May 25, 1922, in the respects indicated, is hereto annexed and submitted.

An order to show cause is asked and I respectfully request that the usual four days' notice of motion be dispensed with for the reason that the pe-
3546 titioner-appellee desires to have the record in this case certified by the Clerk of this Court, and, in fact, has already requested such certification, so that at the very earliest date a petition for a writ of certiorari may be docketed in the Clerk's office of the Supreme Court of the United States, and for the further reason that this Court is now in vacation.

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No previous application has been made for the relief herein asked.

EDMUND L. MOONEY.

Sworn to before me this
19th day of June, 1922.

ANDREW R. MCLAREN,
Notary Public,
New York Co.
(Seal) **[1186]**

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3550 **Copy Order Annexed to Affidavit.**

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of May, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.
" LEARNED HAND,
3551 District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner,
WILLIAM C. HECHT, as United States Marshal,
Appellant.

3552 Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the appellee is remanded to the custody of the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree. **[1187]**

H. W. R.
C. M. H.

Proposed Order Amending Order for Mandate, Annexed to Affidavit.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York on the day of June, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges,
" LEARNED HAND,
District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal for the Southern District of New York,
Respondent-Appellant.

The petitioner-appellee having moved this Court by order to show cause dated June 20th, 1922, for an order amending the order for mandate of this Court heretofore made, entered and filed in the office of the Clerk of this Court on May 25, 1922, as follows:

3556 *Proposed Order Amending Order for Mandate, Annexed to Affidavit.*

In the first paragraph of the said order by striking therefrom the words "from the District Court of the United States for the Southern District of New York" and inserting in lieu thereof the words "from the order of Honorable Martin T. Manton, Circuit Judge of the United States, filed with the Clerk of the United States District Court for the Southern District of New York April 29th, 1921, and recorded in said Court." **[1188]**

3557 In the second paragraph of said order by striking therefrom the words "from the District Court of the United States for the Southern District of New York," and inserting in lieu thereof the words "Certified by the Clerk of the District Court of the United States, Southern District of New York."

In the third paragraph of the said order by striking therefrom the words "the order of the said District Court" and inserting in lieu thereof the words "the said order of Honorable Martin T. Manton, Circuit Judge of the United States."

In the fourth paragraph of said order by striking therefrom the words "to the said District

3558 Court in accordance with this decree" and in lieu thereof inserting the words "in accordance with this decree to said Circuit Judge."

And said motion having come on duly to be heard before this Court on the day of June, 1922, and after hearing Edmund L. Mooney, counsel for the petitioner-appellee, in support of the said motion, and

United States District Attorney for the Southern District of New York in behalf of the respondent-appellant, in opposition thereto, and due deliberation being had thereon, and on motion of

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John P. O'Brien, Esq., Corporation Counsel of the City of New York, attorney for the petitioner-appellee, it is

ORDERED, that the order for mandate of this Court heretofore made, entered and filed herein on May 25, **[1189]** 1922, as follows:

"At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 25th day of May, one thousand nine hundred and twenty-two.

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Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.
" LEARNED HAND,
District Judge.

3561

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Proposed Order Amending Order for Mandate, Annexed to Affidavit.

3562

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the appellee is remanded to the custody of the appellant.

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It is further ordered that a Mandate issue to the said District Court in accordance with this decree."

be and it hereby is amended and resettled nunc pro tunc to read as follows:

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"At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the **[1190]** City of New York, on the day of June, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH, Circuit Judges. 3566
" LEARNED HAND, District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal,
Respondent-Appellant. 3567

Appeal from an order signed by Honorable Martin T. Manton, filed with the Clerk of the United States District Court for the Southern District of New York, April 29, 1921, and recorded in said Court.

This cause came on to be heard on the transcript of record certified by the Clerk of the District Court of the United States, Southern District of New York, and was argued by

3568 *Proposed Order Amending Order for Mandate, Annexed to Affidavit.*

counsel; on consideration whereof, it is now hereby

ORDERED, ADJUDGED AND DECREED that the said order be and it hereby is reversed and that the appellee is remanded to the custody of the appellant; it is further

ORDERED, that a mandate issue in accordance with this decree." **[1191]**

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Indorsement.

Court's Memorandum on Motion to Amend.

This application to amend the order for mandate in the Matter of Craig is hereby granted to the extent shown in the annexed papers.

June 26, 1922.

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H. W. R.
C. M. H. **[1192]**

Answering Affidavit on Motion to Resettle Order. 3571

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM C. HECHT, as United States Marshal for the Southern District of New York,
Respondent-Appellant. 3572

Southern District of New York, } ss.:
County of New York, }

David V. Cahill, being duly sworn says:

I am Special Assistant United States Attorney for the Southern District of New York; have been of Counsel for the Government in the above entitled case since its inception as a prosecution for criminal contempt and have had exclusive charge of this appeal. 3573

With respect to the pending motion I respectfully call the Court's attention to the fact that while it is in form a motion to resettle and amend this Court's order dated May 25, 1922, it is in fact a motion for reargument of an issue decided by this Court. It seeks again to raise the issue whether the order signed by a Circuit Judge was a Court Order

3574 or a Judge's Order. That issue was raised, discussed and decided on the motion to dismiss the appeal herein. It was discussed in the briefs by counsel on both sides and was discussed at length on the oral argument on the motion to dismiss the appeal. This Court filed no written opinion when it decided that motion but its opinion on the merits of the appeal disposes of that issue and finally decides that the order was a Court Order. **[1193]**

That decision was made without regard to the form of the order. The appellant was undecided as
3575 to whether it was a Court Order or a Judge's Order and it was not in appellant's power to decide the question. In the appeal papers the order was described by reference to the Judge who signed it, its date and its purport and effect. These terms of description no matter how they may be treated cannot be considered as fixing the character of the order. Even if the appellant had elected to treat it as a Judge's Order this Court would not be bound by his choice. As a matter of fact in the brief submitted in opposition to the motion to dismiss the appeal one point in the argument was that assum-
3576 ing the order to be a Court Order it was appealable. The next point was that assuming it to be a Judge's Order, it was appealable.

In this Court's decision on the merits it referred to the opinion of the Circuit Judge referring to the order designating him to hold the District Court. This reference of the Circuit Judge immediately preceded his denial of the motion to dismiss the writ of habeas corpus for want of authority to issue it (fols. 46-47 of the record).

Furthermore throughout the whole proceeding the appellee urged that the question of the power of the

Circuit Judge to issue the writ of habeas corpus and to make the order appealed from was a moot question.

In the traverse to the return at folios 2559-2550, Volume 2 of the Record, petitioner-appellee says:

> "Your petitioner still further avers and alleges that any question of your Honor's jurisdiction or authority to issue the said writ of habeas corpus in your capacity as Circuit Judge of the Second Circuit, is a moot question, in view of the fact that you had been 3578
> designated and at the same time and place you were actually acting in the place of the District Judge ordinarily assigned for the transaction of such matters."

In the argument on the writ Counsel for the Appellee asked the Circuit Judge to take judicial notice of the order designating **[1194]** him to hold the District Court (fol. 2610) and urged that the question of his power to act as Circuit Judge in the matter was "an entirely moot or academic point" (fol. 2611). 3579

Throughout the whole argument the assertion of the power to issue the writ and make the order was coupled with a reference to the order of designation. Another instance is at folio 2642.

The proof offered at folios 2643-3659 relates entirely to this point. When it was proposed by counsel for the appellee to prove that the Circuit Judge had been designated to hold the District Court, objection was made by counsel for the appellant that it was immaterial (fol. 2645). The Court said:

3580 "Of course, you are trying to take advantage of this assignment, I take it."

And Counsel for the Appellee said:

"In other words, I want to super-add this assignment."

The assignment referred to was the order designating the Circuit Judge to hold the District Court. It was received in evidence over appellant's objec-
3581 tion.

The appellee went beyond this and endeavored to show that the Circuit Judge was the only one holding the District Court at the time when the paper called the Writ of Habeas Corpus was issued (fols. 2650-2657).

I have gone thus fully into the issue in order to recall to the Court's attention the facts out of which the issue arises.

I again respectfully urge that this motion is an effort indirectly to reopen an issue that has been finally closed and determined by this Court. It is
3582 without **[1195]** reason or merit and contrary to the rules and policy of this Court.

DAVID V. CAHILL.

Sworn to before me this
day of June, 1922.

CARL. BRECHER,
Notary Public,
Kings County.
Clerk's No. 496, Register's No. 3178;
N. Y. Clerk's No. 317, Reg's No. 3340;
Commission expires March 30, 1923. **[1196]**

Amended Order for Mandate.

3583

[1197]

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 27th day of June, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH, Circuit Judges
" LEARNED HAND, District Judge.

3584

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM G. HECHT, as United States Marshal,
Respondent-Appellant.

3585

A motion having been made herein by counsel for the Petitioner Appellee to amend the order for mandate filed and entered herein on the 31st day of May, 1922.

Upon consideration thereof it is

ORDERED that said order be and it hereby is amended to read as follows, to wit:

3586

"At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building, in the City of New York, on the 29th day of May, one thousand nine hundred and twenty-two.

Present—Hon. HENRY WADE ROGERS,
" CHARLES M. HOUGH,
Circuit Judges.

3587 " LEARNED HAND,
District Judge.

In the Matter
of
CHARLES L. CRAIG,
Petitioner-Appellee,
WILLIAM G. HECHT, as United States Marshal,
Respondent-Appellant.

3588

Appeal from the order signed by Honorable Martin T. Manton, filed with the Clerk of the United States District Court for the Southern District of New York, April 29, 1921, and recorded in said Court.

This cause came on to be heard on the transcript of record certified by the Clerk of the District Court of the United States, Southern District of New York, and was argued by counsel; on consideration whereof it is now hereby,

ORDERED, ADJUDGED AND DECREED that said order be and it hereby is reversed and that the appellee is remanded to the custody of the appellant; it is further

ORDERED that a mandate issue in accordance with this decree."

H. W. R.
C. M. H. **[1197]**

3590

Indorsement on Order.

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT.

In re
CHARLES L. CRAIG

3591

Original

ORDER

United States Circuit Court of Appeals, Second Circuit.

Filed, June 28, 1922.

William Parkin, Clerk. **[1198]**

3592 **Clerk's Certificate.**

United States of America,
Southern District of New York, } ss.:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 1198 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Charles L. Craig, as the same remain of record and
3593 on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of June in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty sixth.

WILLIAM PARKIN,
Clerk.

3594 Seal:
United States Circuit
Court of Appeals
Second Circuit **[1199]**

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which William C. Hecht, United States Marshal for the Southern District of New York, is appellant, and Charles L. Craig is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from order signed by Honorable Martin T. Manton filed with the Clerk of the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 29,038. Supreme Court of the United States, No. 488, October Term, 1922. Charles L. Craig vs. William C. Hecht, United States Marshal, etc. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 6, 1922. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

WILLIAM C. HECHT, United States Marshal for the Southern District of New York, Appellant,

against

CHARLES L. CRAIG, Appellee.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the twenty-sixth day of October, 1922. James M. Beck, Solicitor General. John P. O'Brien, Attorney and Corporation Counsel for the City of N. Y., Counsel for Charles L. Craig.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 6, 1922. [Seal of the United States Circuit Court of Appeals, Second Circuit.] Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed] United States Circuit Court of Appeals, Second Circuit. In re Charles L. Craig. Return to Certiorari.

[Endorsed:] File No. 29,038. Supreme Court U. S. October Term, 1922. Term No. 488. Charles L. Craig, Petitioner, vs. William C. Hecht, U. S. Marshal, etc. Writ of certiorari and return. Filed Nov. 10, 1922.

No. 488

JUL 19 1922
WM. R. STANSB
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IN THE

Supreme Court of the United States

CHARLES L. CRAIG,
Petitioner,

vs.

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

and

BRIEF IN SUPPORT OF MOTION

JOHN P. O'BRIEN,
Corporation Counsel City of New York,
Attorney for Petitioner,
Municipal Building,
City of New York

EDMUND L. MOONEY,
Of Counsel.

Supreme Court of the United States

CHARLES L. CRAIG,
Petitioner,
vs.
WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

Motion for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

Comes now Charles L. Craig, by John P. O'Brien, Corporation Counsel of the City of New York, his solicitor, and George Sutherland and Edmund L. Mooney, of Counsel with the Corporation Counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Court of Appeals lately pending entitled "In the Matter of Charles L. Craig, petitioner-appellee, Thomas D. McCarthy, United States Marshal for the Southern District of New York (William C. Hecht, substituted in his place), appellant"; and to that end he

now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals for the Second Circuit.

JOHN P. O'BRIEN,
Corporation Counsel of the
City of New York,
Attorney and Counsel for Petitioner.

GEORGE SUTHERLAND,
By
Challen B. Ellis,
EDMUND L. MOONEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

CHARLES L. CRAIG,
Petitioner,

vs.

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles L. Craig, respectfully represents:

I. At all times hereinafter mentioned your petitioner was and now is Comptroller of the City of New York, the chief financial officer of said City, and, as such, a member of the Board of Estimate and Apportionment of said City, duly qualified and acting as such. On November 8, 1921, your petitioner was duly re-elected for a term of four years from January 1, 1922, as such Comptroller of the City of New York, and as such Comptroller is performing the duties of such office.

II. Your petitioner presented to your Honorable Court an earlier application for a writ of certiorari and/or mandamus, seeking to have cer-

tain questions herein considered, especially because of conflict between Courts of Appeals of different circuits on jurisdictional matters. Your petitioner did this in the belief that your Honorable Court had sole jurisdiction in the premises. But the Solicitor General opposed the application on the ground that it was premature, or to use his language, a "short cut across a lot" (Brief of Solicitor General, p. 5), and suggested that consideration by this Court should await the determination of the Circuit Court of Appeals on the questions involved (*id.*, pp. 6-8). Thereupon your petitioner's earlier application for a writ was refused. Then the appeal was argued before the Circuit Court of Appeals for the Second Circuit, and decided adversely to your petitioner by a divided Court, District Judge LEARNED HAND dissenting in an opinion. Even in the opinion of the Court, written by Circuit Judge HENRY WADE ROGERS, with whom Circuit Judge CHARLES M. HOUGH concurred, appear these words:

> "If this court is in error in the conclusion at which the majority of the court has arrived it is by no means impossible that the Supreme Court can correct any mistake we may have made" (Record, p. 1160).

Your petitioner presents this application in the belief that the questions of public moment set forth in Paragraph XXVII below should be considered by your Honorable Court.

III. Heretofore and on February 24, 1921, the United States District Court for the Southern District of New York, held by Hon. JULIUS M. MAYER, District Judge, entered an order in the office of the Clerk of said District Court assuming to adjudge

your petitioner, Charles L. Craig, Comptroller of the City of New York, in contempt of court (Record, p. 838) for writing and sending the following letter in his official capacity:

"October 6, 1919.

"Hon. Lewis Nixon,
Public Service Commissioner,
No. 49 Lafayette Street,
New York City.

Dear Sir:

Replying to your letter of October 1st:

Apparently without inquiry and without information, you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the Finance and Budget Committee of the Board of Estimate and Apportionment (comprising the entire Board), to drop the preparation of the largest budget in the history of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late.

In your letter you say:

'It may be necessary to review figures and examine leases and agreements that will consume time.'

Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

When the applications were made to Judge Mayer in the 'friendly' proceedings instituted by those interested in these corporations for the appointment of a Receiver of their own liking, if not of their own selection, the Corporation Counsel of the City of New York acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge Mayer that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just to The City of New York, and the members of the Board of Estimate and Apportionment might be accurately informed with respect thereto in order that any action deemed necessary by the City might be taken.

As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge Mayer set himself against it. It was clearly understood that conditions were certain to develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge Mayer refused to grant any of the relief sought by the City. He not only denied the relief, but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.

Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the Municipal authorities the opportunity to ascertain the truth.

The franchises and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs and the darkest scandals of Municipal history, both in the old City of New York and in the City of Brooklyn, prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interests. They will open and open wide without any reservations or restrictions before there will be any conference so far as I am concerned.

It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a contest with corporate powers entrenched in darkness and concealment.

The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge Mayer, denying to The City of New York any representation in these receiverships, rests upon those who procure and are protected by such orders.

As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications,

should procure the entry of orders by Judge Mayer putting The City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

Yours very truly,

CHARLES L. CRAIG,
Comptroller."

(Record, p. 8 *et seq.*)

The circumstances under which the foregoing letter was written are set forth in paragraphs XII to XV of this petition.

IV. On February 24, 1921, on motion of the United States Attorney, said Court assumed to sentence your petitioner to a term of sixty days at the Essex County Jail at Newark, in the State of New Jersey, for such alleged contempt of court. (For commitment, see Record, at page 37.) Thereupon your petitioner was taken into custody by Thomas D. McCarthy, then United States Marshal for the Southern District of New York, and while in the custody of the Marshal, presented a petition to the Hon. Martin T. Manton, Circuit Judge of the United States for the Second Circuit, for a writ of habeas corpus requiring your petitioner to be brought before him to inquire into the cause of your petitioner's detention. (For petition, see Record, at pages 33-88, 821-840.)

Said Circuit Judge had theretofore, on the 18th day of February, 1921, been designated and appointed by the senior Circuit Judge of the Second Circuit, pursuant to Section 18 of the Judicial Code, to hold a session of the United States District

Court for the Southern District of New York, for the trial of causes and for the hearing and disposing of such *ex parte* and other business as might come before him during the period beginning February 21, 1921, and ending March 5, 1921, and was at the time of your petitioner's application acting under such designation, at Chambers, the District Court not being then in session (Record, pp. 868, 882, 887).

In the said petition your petitioner averred that he had been deprived of his liberty without due process of law contrary to the Constitution of the United States and the amendments thereto, in that District Judge Mayer acted in excess of jurisdiction and in excess of the jurisdiction of said District Court held by him in assuming to adjudge your petitioner guilty of contempt of Court and sentencing your petitioner therefor.

Thereupon said Circuit Judge Manton granted the petition of your petitioner and issued the writ thereon. The petition (including the annexed Exhibits) is set forth at pages 33 to 88 and 821 to 840 of the printed record herewith submitted. Thereupon said writ, together with a copy of said petition, was served upon said Marshal and pursuant thereto, said Marshal produced the body of your petitioner before Circuit Judge Manton forthwith, and the further hearing in the matter, upon the application of the United States District Attorney, appearing in behalf of said Marshal, was adjourned until March 3, 1921, at which time a formal Return to said writ by said Marshal was made and submitted by said District Attorney to Circuit Judge Manton. Your petitioner thereupon submitted to Circuit Judge Manton, at Chambers, his Denial and Traverse to the Return of said

Marshal. Said Return and Traverse appear at pages 841 to 868 of the printed record herewith submitted. Thereupon said Circuit Judge at Chambers proceeded to determine the facts of the case by hearing testimony and arguments and to dispose of your petitioner as law and justice required (Record, pp. 869-887). Upon the hearing all the evidence on the trial before Judge Mayer was received in evidence (Record, pp. 878-880, 887, 89-820, 889-1128).

V. Thereupon said Circuit Judge rendered his opinion and decision (274 Federal Reporter, p. 177), holding that the District Court had exceeded its jurisdiction by an excess of power in assuming to adjudge your petitioner guilty, and made an order discharging your petitioner and directing that the papers in the habeas corpus proceeding be filed with the Clerk of the United States District Court for the Southern District of New York, in his office at the Post Office Building, in the Borough of Manhattan, City of New York, and that the order of discharge be recorded in said Court. Copies of said decision and order appear in the printed record submitted herewith at pages 6 to 32 thereof.

Said order was made and filed on the 29th day of April, 1919. Your petitioner relied on his discharge under said order of Circuit Judge Manton and did not present to District Judge Mayer for signing any bill of exceptions of the trial in the contempt proceeding, prior to the expiration of the time therefor under the rules and practice of said District Court. The time so to do expired on the 24th day of May, 1919, and before the appeal from said order of discharge was applied for and allowed.

VI. After your petitioner's discharge in the habeas corpus proceeding aforesaid, and on or about July 25, 1921, said Marshal presented to Honorable Charles M. Hough, United States Circuit Judge of said Second Circuit, certain assignments of error, dated July 25, 1921, together with the petition of said Marshal of the same date, and thereupon said Circuit Judge assumed to allow to said Marshal an appeal from said order of discharge, in said habeas corpus proceeding, to the United States Circuit Court of Appeals for the Second Circuit. Circuit Judge Hough at the time issued a citation, citing and admonishing your petitioner to appear before the said Court of Appeals on August 25, 1921, pursuant to the order allowing said appeal, to show cause, if any there be, why the order of Circuit Judge Manton mentioned in the said order allowing said appeal, should not be corrected and why speedy justice should not be done in that behalf (Record, pp. 1-5).

VII. Thereafter, at the earliest possible date, your petitioner moved said Circuit Court of Appeals to dismiss said appeal for the jurisdictional reasons set forth in said motion, which said motion was subsequently denied by said Court, all of which appears more fully in the record filed upon your petitioner's previous application to your Honorable Court referred to in Paragraph II hereof.

VIII. Thereafter said Marshal resigned and Wm. C. Hecht was commissioned as his successor, and was thereupon made party to said appeal in the place and stead of said Marshal McCarthy (Record, p. 1130).

IX. Thereafter and on or about the 29th day of May, 1922, said Circuit Court of Appeals en-

tered its decree reversing said order and remanding your petitioner to the custody of said Marshal and directing the issuance of the mandate accordingly; (Record, p. 1179) but prior thereto, on the 23d day of May, 1922, said Court, by order of said Circuit Judge ROGERS, directed that said mandate be withheld and the execution of your petitioner's sentence be stayed upon condition that this application be docketed on or before August 29, 1922, and, in the event that this application be so made, until your Honorable Court passes upon and disposes of this application and until the further order of your Honorable Court in the premises.

X. Under the decisions of your Honorable Court, your petitioner, as now advised, has no right to review by appeal or writ of error the determination of said Circuit Court of Appeals in the appeal as aforesaid. Your petitioner respectfully submits that said Circuit Court of Appeals heard and determined said appeal without jurisdiction in the premises and without any adequate remedy at law to your petitioner for review of its determination on said appeal. Your petitioner claims that the proceedings of said Circuit Court of Appeals in the premises were wholly without warrant of law and are therefore null and void.

XI. A question is involved in the said proceeding and in this application of great public importance and urgency. Your petitioner is daily confronted with the possibility of being imprisoned in a State foreign to the State in which he is exercising his official functions and duties and of being prevented thereby from performing the same, and is also confronted with the possibility of additional imprisonment for a like or similar exercise of the

functions of his office in accordance with his conscientious convictions as to his duties under his oath of office and is prevented from freely exercising the same.

XII. The circumstances under which the letter which formed the basis of the contempt proceedings was written were as follows:

XIII. Prior to the writing of the letter complained of, and between December 31, 1918, and March 31, 1919, the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation, the New York Consolidated Railway Company and the New York Railways Company, all operating street, subway or elevated railways in the City of New York, found themselves in financial difficulties and receivers in equity were appointed by District Judge MAYER (Record, pp. 951-955, 1052-1073). The Interborough Consolidated Corporation, also a railway corporation, was declared a bankrupt and a receiver of its assets was appointed (Record, p. 914, fol. 2742; p. 529). On January 15, 1919, the City of New York, pursuant to resolution of the Board of Estimate and Apportionment, through its Corporation Counsel, applied to the District Court, on the motion for the appointment of the permanent receiver, for the appointment of a co-receiver in the Brooklyn Rapid Transit Company suit. It was sought to have the Comptroller, your petitioner, appointed receiver. The intention was that he would serve without compensation and thus look after the interests of the City of New York. The City was interested in representing its citizens as well as protecting its great financial and other rights under the various franchises granted to the Railway Corporation (Record, pp. 1008-

1052). The Court denied the application for the appointment of a co-receiver. This denial was upon the merits, but the opinion stated that it was "without prejudice to its renewal at such time as counsel may be advised" (Record, pp. 1068-1073). No further application for the appointment of a co-receiver was made before the petitioner wrote and sent the letter which is the subject of the charge for contempt. The controversy between the officials of the City and those who had charge of the affairs of the railway companies was very spirited. An application was made before the Board of Estimate and Apportionment for an increase in fare and this gave rise to hostility in the controversy.

XIV. Between the time of the appointment of receivers and the 1st of October, 1919, expert accountants appointed by the Court, made an examination of the books and made a report as to the financial condition of the company and suggestions were made as to the requirements of the company.

XV. Mr. Lewis Nixon was the Public Service Commissioner for the First District of the State of New York, which district embraces the City of New York. Under the statute the Commissioner had certain regulatory powers over the said railways, especially with reference to rates and charges (Public Service Commission Law, N. Y. Laws 1907, C. 429, Sec. 49, as amended by L. 1911, C. 546). On October 1, 1919, Mr. Nixon called for a conference to be held in the City of New York on October 6th, following, for the purpose of discussing the financial and physical condition of the traction lines of the City of New York, including the Brooklyn Rapid Transit Company. He invited the officials of the City of New York, including your

petitioner, to this conference. On October 6, 1919, your petitioner wrote and caused to be sent the letter which formed the basis of the contempt proceeding and which is set forth in Paragraph III of this petition. The letter was in response to the official invitation to the conference and was signed by your petitioner in his official capacity (Record, pp. 733-736).

XVI. Your petitioner was a witness in his own behalf in the proceeding to punish him for the alleged contempt. He gave testimony as to his intention and purposes in writing the letter referred to: The letter from Commissioner Nixon came to him on the morning of October 6th and was one of the many things he had to attend to on that morning. His letter, in reply, was written in considerable haste and the writer's purpose was to "get into the mind of Nixon the necessity for that kind of co-operation resulting in the public authorities being on an equal footing with those representing the traction interests." Your petitioner testified further that it was physically impossible for him to have attended the conference on October 6th; that he did not expect the Commissioner to read the letter at the conference; that the letter was not intended for anyone but the Public Service Commissioner; that the letter reached the public press through a usual routine of giving out letters for publication which prevailed in the Department of Finance; that this was done through the Secretary of the Finance Department, who was an appointee of and paid by the City. Your petitioner further testified as to what he intended by the language employed in the letter; that what your petitioner meant by "original sources" was that letters and comments of

the railroad companies were kept in their archives, and your petitioner meant by denying access to original sources, inability to have "full and unrestricted access with power to compel any subordinate to produce or dig up whatever it might be, or be suspected of being, all of the facts that relate to these companies," "that anything that cut us short of that was a denial of access to the original sources, and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have someone who was in a position to bring about these disclosures, and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources." Your petitioner further testified how and in what respects it was important to the financial interest of the City of New York and to its citizens, to have its officials well informed of the matters pertaining to the railroad company's affairs; and that the most feasible and practicable way to this end was that a co-receiver be appointed who, in some way, would be representative of the City. Your petitioner denied upon oath that at any time he intended to convey the meaning that the District Judge had, in point of fact, denied access to original papers, except insofar as such denial might flow from his refusal to appoint him co-receiver (Record, pp. 573-587; 600-612).

XVII. At the time that said letter was written, there was not pending *sub judice* in said Court before District Judge Mayer or any other Judge thereof, awaiting decision, any order or judicial determination in said receivership suit or in any other

suit or proceeding relating to said traction lines. The subject matter of the criticism in your petitioner's letter was not then pending *sub judice;* but, on the contrary, had long before been disposed of.

XVIII. At no stage of the contempt case, nor in the proceeding in habeas corpus, has it ever been contended or claimed that any proceeding was pending *sub judice* that could possibly have been affected by the writing of the letter in question, but on the contrary, it was expressly disclaimed that there was awaiting decision any order or judicial determination mentioned in said letter. The return of the Marshal to the writ of habeas corpus is explicit and definite as to this:

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."
>
> (Record, pp. 842-3, Paragraph IV)

XIX. In the contempt proceeding the information, for the purpose of establishing jurisdiction, averred the pendency of certain suits and a bankruptcy proceeding (Record, pp. 44-45). Numerous papers and proceedings of record therein were proven by the District Attorney in his effort to establish some matter *sub judice* before the District Court at the time of the writing of the letter of October 6, 1919. The whole of the evidence on the contempt trial is printed in the Record (pp. 887, 1128, 879-880; testimony, pp. 89-730); and every paper or proceeding proved in this effort on the part of the Government to establish that, at the

time of the letter, some matter was under judicial cogitation, appears in pages 889 to 1128, inclusive, but nowhere does it appear that there was then any matter under judicial deliberation or consideration.

The District Court based its jurisdiction in the contempt proceeding on the proposition that, regardless of whether there was any "definite matter * * * to be disposed of by the Court's order, judgment or decree," as there was a receivership suit or proceeding pending in which "the Court would be called upon from time to time to make orders and decrees," * * * until "the property is no longer in the court, and the Court by its final decree or proper order has released the property from its custody, and *has no further duty to perform,*" the suit or proceeding is "in every sense pending," so as to give the Court jurisdiction to punish for contempt any criticism of its accomplished act or fact (Opinion of the Court, *United States* v. *Craig,* 266 Fed. 230, 234, referred to in the Record at page 825). In other words, the District Court held that, if any matter pertinent to the receivership property were still susceptible of judicial consideration, criticism of the Court's acts could be punished as contempt of court, if the criticism could at any time influence the Court in any possible action relating to the receivership property.

XX. The facts and circumstances which were the cause and pretext of the detention of your petitioner are as follows:

XXI. On or about November 13, 1919, an Information was filed in the office of the Clerk of the District Court of the United States for the South-

ern District of New York. A copy of said Information is set forth in the Record at pages 44 to 70.

XXII. Thereupon an order was made by District Judge Mayer dated November 20, 1919, requiring your petitioner to show cause why he should not be declared and adjudged in contempt of the United States District Court for the Southern District of New York, by reason of the facts set forth in said Information (Record, page 71). Your petitioner appeared involuntarily (Record, p. 75) and challenged the jurisdiction of the Court at every stage of the proceedings.

XXIII. On such objection being overruled, and exception being duly taken thereto, your petitioner demurred to the Information charging him with contempt of Court (Record, p. 82). Such demurrer was overruled (266 Federal Reporter, p. 230). Thereupon your petitioner entered a plea of not guilty (Record, p. 88). Your petitioner asked that another Judge of the District Court be designated to hear the proceeding (Record, p. 532), but said requests and each of them was overruled by District Judge Mayer, to which exception was duly taken by counsel for your petitioner.

XXIV. District Judge Mayer assumed to try your petitioner, and thereupon handed down or filed his decision or opinion (Record, pp. 821-837); and on or about February 24, 1921, said District Judge assumed to sign an order in and by which he assumed to find and declare your petitioner in contempt of said Court as charged in said Information in respect of the matters set forth in Paragraphs 1, 2, 3 and 4 of said Information, and further assumed to require your petitioner to appear before said Court on Febru-

ary 24, 1921, for further proceedings therein (Record, pages 838-839).

XXV. Thereafter, on the 24th day of February, 1921, District Judge Mayer assumed to sign an order or commitment directing that your petitioner be imprisoned for a term of sixty days, sentence to be executed at the Essex County Jail, Newark, New Jersey. A copy of this order is set forth in the printed record submitted herewith, at page 37 thereof. Thereupon and forthwith your petitioner was taken into custody by the United States Marshal for the Southern District of New York for imprisonment under the provisions thereof.

XXVI. Then followed the habeas corpus proceedings above set forth and the discharge of your petitioner and the proceedings upon said Marshal's appeal.

XXVII. Your petitioner submits that the judgment of the Circuit Court of Appeals for the Second Circuit should now be brought here for review by Your Honorable Court, for the following

REASONS:

1. Because there is involved the jurisdictional authority of a Circuit Judge as such, to issue a writ of habeas corpus, the Circuit Court of Appeals having denied that authority, notwithstanding its unbroken exercise since the creation of the office of Circuit Judge, and notwithstanding that there has been no express amendment of the Habeas Corpus Act in that respect.

The Marshal's return to the writ of habeas corpus contains the following on this point (p. 842 of Record):

> "It is respectfully urged that your Honor is and was without jurisdiction or authority to issue any writ of habeas corpus to the petitioner herein, because no provision of the laws of the United States vests authority to issue writs of habeas corpus in any Circuit Judge or in any judge of the United States Circuit Court of Appeals."

The Assignment of Errors (p. 2 of Record) contains the following:

> "I. The Circuit Judge erred in signing and granting the paper called the writ of habeas corpus herein because the said Circuit Judge had no power or jurisdiction to grant or sign the same.
>
> "II. Said Judge erred in denying the motion made by respondent to dismiss the proceeding upon the ground that the said Circuit Judge of the United States had no jurisdiction or power to grant or issue a writ of habeas corpus or discharge on a writ of habeas corpus."

The Circuit Court of Appeals in the instant case has expressly held that a Circuit Judge has no such power. To maintain that jurisdictional foothold, the Court has held, in legal effect, that the order appealed from was an order of the District Court (Record, p. 1141), which your petitioner stoutly denied.

This Court has held that the Circuit Court of Appeals has no power to issue a writ of habeas corpus (*Whitney* v. *Dick*, 202 U. S., 132), but it has never been held, until the decision in the instant case, as far as your petitioner is informed, that a Circuit Judge had not that power.

However the question may ultimately be decided, it is obviously one of great importance since it in-

volves the jurisdictional authority of thirty-four Circuit Judges and the newly created Circuit Judges throughout the United States, and thereby confines the issuance of such writs, for practical purposes, to the District Courts and the District Judges.

2. Because the Circuit Court of Appeals has assumed to review upon appeal an order of a Circuit Judge discharging your petitioner in habeas corpus although under the uniform decisions of Your Honorable Court no appeal lies from an order of a Judge; but only an order of a Court may be reviewed by appeal or writ of error (*Carper* v. *Fitzgerald,* 121 United States, 87; *In re Lennon,* 150 United States, 393; *McKnight* v. *James,* 155 United States, 685; *Lambert* v. *Barrett,* 157 United States, 697; *Harkrader* v. *Wadley,* 172 United States, 148) and thereby the Circuit Court of Appeals for the Second Circuit failed to follow or give force or effect to the rulings and decisions of your Honorable Court on the legal questions involved.

3. Because, in entertaining jurisdiction of the appeal from the order of Circuit Judge Manton discharging your petitioner, there is a direct conflict of decision upon the appealability of a Judge's order with the Circuit Court of Appeals for the Fifth Circuit, which held that a Circuit Court of Appeals had no appellate jurisdiction to review such an order (*Hoskins* v. *Funk,* 239 Fed., 278). In the interest of uniformity of decision which, therefore, cannot otherwise be established, it is necessary that this Court should interpose for the purpose of settling the conflict.

4. Because the Circuit Court of Appeals has assumed to consider the order of Circuit Judge

MANTON discharging your petitioner as an order of the District Court (Record, p. 1141), so as to assume jurisdiction of an appeal therefrom, notwithstanding your Honorable Court has held that such an order is not an order of a court (*Carper* v. *Fitzgerald,* 121 U. S., 87).

5. Because the order discharging your petitioner, from which said Marshal appealed to the Circuit Court of Appeals, and the decision upon which it rested, as also the said appeal, involved the construction and application of the Constitution of the United States, in that your petitioner based his application for a writ of habeas corpus on the fact that he had been deprived of his liberty without due process of law in violation of the fifth amendment of the Constitution of the United States, inasmuch as the District Court acted in excess of its jurisdiction in assuming to convict your petitioner of contempt of Court. *Ex parte Hudgings,* 249 U. S., 378; *Ex parte Royall,* 117 U. S., 241; *Ex parte Lange,* 85 U. S. (18 Wall), 163; *New York* v. *Eno,* 155 U. S., 89; *In re Loney,* 134 U. S., 372; *Ex parte Siebold,* 100 U. S., 371; *Ex parte Parks,* 93 U. S., 18. The appellate jurisdiction of the Circuit Court of Appeals does not extend to such a case, of which your Honorable Court had exclusive jurisdiction by direct appeal. Judicial Code, Sec. 238; *Raton Waterworks Co.* v. *City of Raton,* 249 U. S., 552; *Union & Planters Bank* v. *City of Memphis,* 189 U. S., 71; *Carolina Glass Co.* v. *State of South Carolina,* 240 U. S., 305, at pages 317 to 319; *Horn* v. *Mitchell,* 243 U. S., 247; *Greene* v. *Louisville & I. R. R. Co.,* 244 U. S., 499; *Pierce* v. *Creecy,* 210 U. S., 387; *Horner* v. *United States* (1892), 143 U. S., 207.

6. Because the letter which was made the basis of the criminal contempt charge was the subject of absolute privilege (*Spalding* v. *Vilas*, 161 U. S., 483 *Dearnaud* v. *Ainsworth*, 24 App. D. C., 167; 5 L. R. A. (N. S.), 163; *Farr* v. *Valentine*, 38 App. D. C., 413; *Chatterton* v. *Secretary of State for Inda*, 2 Q. B. (1895), 189; *Dawkins* v. *Paulet*, L. R., 52 B., 94; *Beatson* v. *Skene*, 5 Hurl. & Nor. (Exheq.), 823.

7. Because your petitioner was declared guilty of contempt of court "as charged," though there was no contempt, especially within the limitations of Section 268 of the Judicial Code, either in the substance or the language of the letter which was made the basis of the charge.

8. Because there was no misbehavior and no tendency to obstruct the administration of justice in the letter which was made the basis of the contempt charge (*In re Hudgings*, 249 U. S., 378).

9. Because no judicial determination of any character whatsoever was pending *sub judice* in the District Court at the time of the letter, which was made the basis of the contempt charge; and criticism of the courts, after the conclusion of judicial cogitation, is not punishable as contempt, even if the criticism be unwarranted (*Patterson* v. *Colorado*, 205 U. S., 454, 463).

10. Because by the decision in question the fundamental right of free speech and free publication, which belong to your petitioner under our form of government, and under the guaranties and implications of the Constitution of the United States, by which judges and courts in respect of their past actions are subject to criticism as other people, has

been infringed, contrary to the decisions of this Court.

11. Because the act complained of was not criminally contemptuous since it was not wilful nor with criminal intent; nor was the publication thereof charged to be wilful or with criminal intent; and your petitioner was declared guilty only "as charged."

12. Because, if the adjudication of the District Court be deemed to imply that it declared your petitioner guilty of contempt in obstructing the administration of justice, in that your petitioner's conduct tended and was intended to influence the Court in the consideration of the receivership proceeding, to intimidate the Court and to compel it to decide future questions as your petitioner wished, and to obstruct the Court's orders in such suits, nowhere has it appeared in proof or allegation what future decisions would or could in fact have been influenced. The whole record in the contempt proceedings is in this record (see Record, pp. 887, 1128, 879-880) and therefrom it appears that nothing was pending at the time or was imminent on which the Court was to act (Record, pp. 889-1128; 89-730).

13. Because, if the adjudication of the District Court declaring your petitioner in contempt be deemed to imply that the publication of the letter in the newspapers was wilful, there was no allegation in the Information that the publication was made (a) wilfully, (b) knowingly, (c) unlawfully, or (d) contemptuously; and there was an absolute lack of any participation of your petitioner in effecting the appearance of the letter in any newspaper.

14. Because the ruling of Circuit Judge HOUGH, that a paper writing is not a writ of habeas corpus, when issued by a Judge but only his personal direction, unless "issued by a Court, returnable to the same," "under seal" and "tested by the proper officer" is contrary to the principles applicable to a writ of habeas corpus granted by a Judge in his capacity as Judge (see writ issued by Chief Justice WAITE in *Ex parte Curtis,* 106 U. S., 371, which had neither teste, seal nor clerk's signature, was signed "M. R. Waite, Chief Justice of the United States" and was returnable before "the Chief Justice of the Supreme Court of the United States" in New York City).

15. Because the case is of great and urgent public importance, in that said District Court is still operating, managing and controlling said railways through its receivers, while the City of New York, of which your petitioner is Comptroller and chief financial officer, is vitally and continuously interested in the traction situation and litigation which is the subject matter of the letter, for the writing of which your petitioner was declared to be in contempt, and in that your petitioner is daily confronted in the discharge of his official duties with the possibility of having to serve a sentence of sixty days in the Essex County Jail in Newark, State of New Jersey, which is beyond the confines of the jurisdiction where your petitioner exercises his official functions and which would render him *functus officio* for that period, and with the further possibility of additional imprisonment for a like or similar exercise of the functions of his office; and your petitioner is thereby prevented from freely exercising the same.

16. Because your petitioner, on November 8, 1921, was elected Comptroller of the City of New York for a further term of four years from January 1st, 1922, and as the chief financial officer of the City and a member of the Board of Estimate and Apportionment, it is his duty to pursue a definite policy to safeguard the financial interests of the City with regard to traction properties which are the subject of the receivership actions and proceedings now within the control of the United States District Court for the Southern District of New York, and because the Circuit Court of Appeals has assumed, without jurisdiction, as your petitioner contends, to review the order of the Circuit Judge discharging your petitioner on habeas corpus, and has reversed said order, your petitioner is prevented from pursuing, without the likelihood of further imprisonment, that policy which he conceives it to be his duty to pursue to properly safeguard the interests of the said City of New York in said traction properties while under the management, operation and control of the Court, which still continues, lest by word or act of a like or similar kind he be again put in jeopardy of a charge of contempt and imprisonment therefor.

17. Because at the present time and since the discharge of your petitioner and during the pendency of said appeal, a charter revision commission appointed under an Act of the Legislature of the State of New York (Laws of New York, 1921, Chapter 343) to consider and revise the charter of the City of New York has been and is considering provisions for the ownership and operation of public utilities embracing said street railways and subways, one of which is for municipal ownership and

operation, which necessarily calls for comment and criticism of the presently existing judicial control and operation through receivers of such public utilities. Your petitioner is a member of said Commission and he is embarrassed and circumscribed in the performance of his duties lest legitimate and necessary comment and criticism on such judicial control and operation be regarded as contemptuous. Honorable Julius M. Mayer, since his promotion from District Judge to Circuit Judge and on or about October 13th, 1921, has been designated by the senior Circuit Judge of the Second Circuit under Section 18 of the Judicial Code to hold a session of the District Court of the United States for the Southern District of New York for the trial of causes and the hearing and disposition of motions, and such ex parte and other business as may come before him during the period beginning October 13, 1921, and ending October 13, 1922, and under such designation is continuing in the management and control of such railways through the receivers appointed by him as District Judge.

Your petitioner believes that the judgment of the Circuit Court of Appeals for the Second Circuit reversing the order discharging your petitioner is erroneous and that your Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of law and statutes in such cases made and provided.

Your petitioner presents herewith, as part of this petition, a brief showing more fully his views upon

the questions involved and also a transcript of the record in the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of Your Honorable Court to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to your Honorable Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, therein entitled "In the Matter of Charles L. Craig, Petitioner-Appellee, Thomas D. McCarthy, United States Marshal for the Southern District of New York (William C. Hecht, substituted in his place), Appellant," to the end that said case may be reviewed and determined by your Honorable Court, as provided in Sections 240 and 262 of the United States Judicial Code; that your petitioner may have such other or further relief or remedy in the premises as your Honorable Court may deem appropriate and as law and justice may require, in conformity with the provisions of said Code and the Statutes in such cases made and provided, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof, may be reversed by your Honorable Court.

And your petitioner will ever pray.

CHARLES L. CRAIG.
Petitioner.

JOHN P. O'BRIEN,
Corporation Counsel
of the City of New York,
Attorney and Counsel for Petitioner.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

CHARLES L. CRAIG, being duly sworn according to law on his oath says: I am the petitioner herein. I have read the petition herein. The facts, matters and things set forth in said petition are true according to the best of my knowledge, information and belief. So far as they relate to my own acts, I know them to be true; so far as they relate to the acts of others, I believe them to be true.

CHARLES L. CRAIG.

Subscribed and sworn to before me this 13th day of July, 1922.

ANDREW R. McLAREN,
Notary Public.

(Notarial Seal)

We hereby certify that we have examined the foregoing petition, that said petition is true and that in our opinion it is well founded in point of fact, as well as law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

GEORGE SUTHERLAND,
By
Challen B. Ellis,
EDMUND L. MOONEY,
Counsel.

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IN THE

Supreme Court of the United States

CHARLES L. CRAIG,
Petitioner,

against

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

BRIEF ON BEHALF OF THE PETITIONER FOR WRIT OF CERTIORARI.

The petition is for certiorari to the Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the appeal described in the petition to the end that the said case may be reviewed and determined as provided in sections 240 and 262 of the Judicial Code.

The petitioner, the Comptroller of the City of New York, was charged with contempt of court for certain expressions criticizing the action of District Judge MAYER, now Circuit Judge, in connection with litigations concerning the traction lines in the City of New York, which had been brought in the District Court for the Southern District of New York. The letter is set forth in the petition, pages

5-8, and in the Information (Record, fols. 156-167). It was signed by the petitioner "who was then Comptroller and chief financial officer and a member of the Board of Estimate and Apportionment of the City of New York" (Petition, p. 3) in his official capacity as Comptroller (Petition, pp. 8, 15) , and was "in response to the invitation" of Public Service Commissioner Nixon, who had "called a conference for the purpose of discussing the financial and physical condition of the traction lines in the City of New York, including those involved in the suits and proceedings pending in the District Court, and considering any suggestions that might be made by the conferees with respect to the future of said lines and the relations between them and the City of New York" (Petition, pp. 14, 15). It was further alleged that the petitioner "did cause the said letter to be delivered to the said Public Service Commissioner and to the persons attending the said conference at the said office of said Public Service Commissioner" (Record, fols. 167-168). It was still further alleged that the petitioner "did cause the same to be published in various newspapers" (Record, fol. 168), but, as to the latter, it was shown "that the letter reached the public press through a usual routine of giving out letters for publication which prevailed in the Comptroller's office; that this was done through the Secretary of the Finance Department, who is an appointee of and paid by the City" (Petition, p. 15). The writing was an isolated act, as appears by the Information, and no matter in aggravation was alleged.

An order was made by District Judge MAYER requiring the petitioner to show cause why he should not be declared and adjudged in contempt

of the District Court. The petitioner appeared involuntarily and challenged the jurisdiction of the Court at every stage of the proceeding (Petition, paragraph XXII, p. 19). The petitioner, successively, demurred, and pleaded not guilty, and asked that another judge of the District Court be designated to hear the proceeding, but his requests were overruled by Judge MAYER (Petition, paragraph XXIII, p. 19), who assumed to try the petitioner.

On the hearing the petitioner was a witness in his own behalf. He gave testimony as to his intention and purpose in writing the letter. Commissioner Nixon's letter fixing the time for the proposed conference came to him on the morning of October 6th and was one of the many things he had to attend to on that morning. His letter, in reply, was written in considerable haste, and the writer's purpose was to "get into the mind of Nixon the necessity for that kind of co-operation resulting in the public authorities being on an equal footing with those representing the traction interests" (Petition, paragraph XVI, pp. 15, 16). The petitioner testified further that it was physically impossible for him to have attended the conference on October 6th (*ibid*). The letter itself sets forth that attendance at the conference would require members of the Budget and Finance Committee of the Board of Estimate and Apportionment, of which he was a member, "to drop the preparation of the largest budget in the history of New York City" in which work "they have been for some time past and must continue to be engaged in daily sessions from early to late" (Petition, pp. 5-8); that he did not expect the Commissioner to read the letter at the conference; that the letter was not in-

tended for anyone but the Public Service Commissioner. The petitioner further testified to what he intended by the language employed in the letter; that what he meant by "original sources" was that letters and documents of the railroad companies were kept in their archives, and he meant, by "denying access" to original sources, inability to have "full and unrestricted access with power to compel any subordinate to produce or dig up whatever it might be, or suspected of being, all of the facts that relate to these companies"; "that anything that cut us short of that was a denial of access to the original sources, and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have someone who was in a position to bring about these disclosures; and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources" (Petition, paragraph XVI, pp. 15, 16). The petitioner further testified as to how and in what respects it was important to the financial interest of the City of New York, and to its citizens, to have its officials well informed of the matters pertaining to the railroad companies' affairs, and that the most feasible and practicable way to this end was that a co-receiver be appointed, who, in some way, would be representative of the City. The petitioner denied upon oath that he intended to convey the meaning that the District Judge had, in point of fact, denied access to original papers, except insofar as such denial might flow from his refusal to appoint him co-receiver (Petition, paragraph XVI, pp. 15, 16).

The application for the appointment of the

Comptroller was denied on the 22nd day of January, 1919 (Record, fols. 3202-3219).

At the time that the letter was written, October 6, 1919, there was not pending *sub judice* in the District Court, before Judge MAYER or any other judge, awaiting decision, any judicial determination. The subject matter of the petitioner's letter had long before been disposed of (Petition, paragraphs XVII, XVIII, p. 17; Record, fols. 2526-2528); nine months had elapsed between the action of the Court that was criticized and the date of the letter. No renewal of the application for the appointment of a co-receiver had been made, and the receivership had been made permanent (Record, fols. 3202-3219).

Judge MAYER proceeded to "declare your petitioner in contempt of said Court *as charged* in said Information *in respect of* the matters set forth in Paragraphs 1, 2, 3 *and* 4 *of said Information*" (Petition, paragraph XXIV, p. 19; Record, fols. 2512-2516). The paragraphs of the Information referred to are to be found at folios 168-174 of the Record. Judge MAYER signed an order of commitment directing that the petitioner be imprisoned for a term of sixty days, sentence to be executed at the Essex County Jail, Newark, New Jersey, and thereupon the Marshal took the petitioner into custody (Petition, paragraph XXV, page 20).

The petitioner presented to Circuit Judge MANTON a petition for a writ of habeas corpus while in the custody of the Marshal. At that time Judge MANTON was acting under a designation, pursuant to Section 18 of the Judicial Code, appointing him to hold a session of the District Court for the trial of causes and for the hearing and disposing of such *ex parte and other business as might come*

before him. The Petition was presented at *Chambers,* the District Court not being then in session (Petition, paragraph IV, pp. 8, 9; Record, fols. 2649-2658; 2662-2666).

The petitioner averred that he had been deprived of his liberty without due process of law, contrary to the Constitution of the United States and the amendments thereto, in that District Judge MAYER *acted in excess of jurisdiction and in excess of jurisdiction of said District Court held by him in assuming to adjudge the petitioner guilty and to sentence him* (*vide Ex parte Hudgings,* 249 U. S., 378, and other cases cited *infra,* pp. 42, 54).

Circuit Judge MANTON granted the petition and issued the writ of habeas corpus.

The Return to the Writ explicitly set forth that:

> "On October 6th, 1919, there was not pending, awaiting decision, any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change" (Petition, paragraph XVIII, p. 17; Record, fols. 2526-2528).

Upon the Petition, Return, Denial and Traverse (all of which appear in the Record, fols. 97, 2521, 2554), Circuit Judge MANTON, *at Chambers,* proceeded to determine the facts of the case by hearing testimony and arguments and to dispose of the petitioner as law and justice required (Petition, paragraph IV, pp. 9, 10). Thereupon said Circuit Judge rendered his opinion and decision (*Ex parte Craig,* 274 Fed., 177) holding that the District Court had exceeded its jurisdiction by an excess of

power in assuming to adjudge the petitioner guilty, and made an order discharging the petitioner and directing that the papers in the habeas corpus proceeding be *filed* with the Clerk of the District Court and that the order be *recorded* in said Court (Petition, paragraph V, p. 10; Record, fols. 16-95), thus adopting and following the precise form and procedure of a judge's order that was under consideration by this Court in *Carper* v. *Fitzgerald*, 121 U. S., 87, and other cases cited *infra*, pp. 26, 28.

After the petitioner's discharge in the habeas corpus proceeding, the Marshal presented to one of the Circuit Judges, assignments of error, together with a petition, and thereupon said Circuit Judge allowed an appeal from the order of discharge in the habeas corpus proceedings to the Circuit Court of Appeals for the Second Circuit, and issued a citation (Petition, paragraph VI, p. 11).

The petitioner thereupon applied to the Circuit Court of Appeals, on notice to the Marshal, to vacate and set aside the citation and order allowing the appeal and to dismiss the appeal upon the ground that the Circuit Court of Appeals had not jurisdiction or power to entertain or decide the appeal for the jurisdictional reasons set forth in said motion (Petition, paragraph VII, p. 11), which was thereafter denied (Petition, paragraph II, pp. 3, 4).

After a hearing of the appeal in the Circuit Court of Appeals, that Court (ROGERS and HOUGH, *C. J.*, concurring, LEARNED HAND, *D. J.*, dissenting) reversed the order sustaining the writ of habeas corpus and remanded the petitioner to the custody of the Marshal. A stay has been granted pending this application.

While the appeal was pending in the Circuit Court of Appeals, the petitioner made an application to this Court for a writ of certiorari and/or mandamus, for the reasons and under the circumstances set forth in paragraph II of the Petition. The Solicitor General opposed the application on the ground that it was premature; thereupon that application was refused.

The petitioner sets forth that he has no right to review, by appeal or writ of error, the determination of the Circuit Court of Appeals on the appeal; that the Court determined the appeal without jurisdiction and without any adequate remedy at law to the petitioner of review of its determination, except by writ of certiorari issuing from this Court; and that the proceedings of the Circuit Court of Appeals were without warrant of law (Petition, paragraph X, p. 12).

Grounds of great public importance and urgency are set forth in the petition (paragraph XV, p. 26), and are summarized at the head of Point I, *infra*.

POINT I.

This case and the questions therein are of such public interest and great importance as to warrant the interposition of this Court by certiorari.

The urgent questions that call for the interposition of this Court are:

1. The Circuit Court of Appeals has held that a Circuit Judge has no jurisdictional authority to issue a writ of habeas corpus, notwithstanding its unbroken exercise since the creation of the office of Circuit Judge, and notwithstanding that there has been no express amendment of the Habeas Corpus Act in that respect.

The question involves the jurisdictional authority of thirty-four Circuit Judges and the newly created Circuit Judges, throughout the United States. The present decision confines the issuance of such writs, for practical purposes, to the District Courts and the District Judges. This is discussed under Point II, *infra*.

2. In entertaining jurisdiction of the appeal from the order of Circuit Judge MANTON, there is (a) a disregard of the uniform decisions of this Court that no appeal lies from an order of a Judge (b) a direct conflict of decision, upon the appealability of a Judge's order, with the Circuit Court of Appeals for the Fifth Circuit, which held that a Circuit Court of Appeals had no appellate jurisdiction to review such an order (*Hoskins* v. *Funk*, 239 Fed., 278). In the interest of uniformity of decision it is necessary for this Court to interpose to settle the conflict. This is discussed under Points III and IV, *infra*.

3. The question involves the construction and application of the Constitution of the United States in that the petitioner based his application for a writ of habeas corpus on the claim that he had been deprived of his liberty without due process of law in violation of the fifth amendment of the Constitution of the United States (as in *Re Hudgings,* 249 U. S., 378), inasmuch as the District Court acted in excess of its jurisdiction in assuming to punish the petitioner for contempt when in his act there was no possibility of the "obstruction" of justice. This is discussed under Point V, *infra.*

4. The petitioner is confronted daily, in the discharge of his official duties as chief financial officer of the City of New York with the possibility of an incarceration in the State of New Jersey, beyond the confines of his sphere of office, that would render him *functus officio* for sixty days.

5. The petitioner is prevented from freely exercising his office in safeguarding the financial interests of the City with regard to the traction properties, which are still under control of the Court, lest by word or act of a like or similar kind he be again put in jeopardy of imprisonment.

6. The petitioner is a member of the Charter Revision Commission, which is considering municipal ownership and operation, and this calls for comment on the presently existing judicial control through receivers of such public utilities, and he is embarrassed and circumscribed in the performance of his duties lest legitimate and necessary criticism on such judicial control and operation be regarded as contemptuous, while Circuit Judge MAYER, under designation, is continuing in the management and control of such railways through receivers appointed by him when District Judge.

7. Other reasons of public interest and great importance, even though of less urgency, are set forth in the petition, at pages 20-28, notably that the District Court acted in excess of its powers and beyond its jurisdiction, under the limited powers of a Federal Court to punish for contempt, because the act of which petitioner was held guilty neither "obstructed" nor could possibly obstruct the administration of justice. This is discussed under Point VI, *infra.*

8. The appropriateness of the remedy, by Habeas Corpus is discussed under Point VII, *infra.*

That a certiorari may issue to bring up for review the failure of the Circuit Court of Appeals to dismiss the appeal for lack of jurisdiction in that Court, as also to review the questions of public interest and great importance involved, is clear.

Forsyth v. *Hammond,* 166 U. S., 506;
American Const. Co. v. *Jacksonville Ry. Co.,* 148 U. S., 372;
The Three Friends, 166 U. S., 1;
The Conqueror, 166 U. S., 110;
St. Louis, K. C. & Col. R. R. Co. v. *Wabash Ry. Co.,* 217 U. S., 247;
Hamilton Shoe Co. v. *Wolff Bros.,* 240 U. S., 251;
Smith v. *Vulcan Iron Works,* 165 U. S., 518;
Denver v. *N. Y. Trust Co.,* 229 U. S., 123;
Chicago & N. W. R. R. Co. v. *Osborne,* 146 U. S., 354;
Moran v. *Dillingham,* 174 U. S., 153;
McClellan v. *Carland,* 217 U. S., 268.

This application presents "all the unfortunate possibilities of conflict and collision which might arise" from a further exercise by a municipal officer of the duties of his office in a situation where

the municipality has vast financial interests in local transit properties which are, nevertheless, under the control of a Federal Court. A clash of words has been construed and punished as though it were a clash in acts, and, unless this Court reaches out and defines the legitimate scope of criticism, the municipal officer will not only be imprisoned, but will continue to be repressed in the free exercise of his duties after the term of imprisonment.

We feel that it may be fairly said that the honest expression by an official of his views on a public question within the sphere of his duties is as essentially an official act (*Spalding* v. *Vilas*, 161 U. S., 483) as would be an official order, and that the repression of the one, by the likelihood of recurrent punishment, is a continuing interference with the other.

Moreover, the incarceration of the elected official beyond the confines of his sphere of office would render him *functus officio* for a long period.

In *St. Louis, Kansas City & Colorado Co.* v. *Wabash Railroad Co.* (*supra*), this Court said of a question involving the construction of a decree of a United States Court as related to an entanglement of railway terminal facilities, at page 251:

> "It seems to us that both the private interests of the railroad companies, and of the separate industries and the greater interests of the public call for the granting of the writ of certiorari, and it is, therefore, so ordered."

Doubtless, because of the seriousness and importance of the questions involved, the Court below in its opinion said:

> "If this Court is in error in the conclusion at which the majority of the Court has arrived it is by no means impossible that the Supreme Court can correct any mistake we may have made" (*Record*, fol. 3473).

POINT II.

The Circuit Judge had jurisdictional authority to issue the writ of habeas corpus.

If the circuit judges have not now the jurisdictional authority to issue writs of habeas corpus, it is because their jurisdictional authority, which up to the passage of the Judicial Code indubitably existed, has been lost, not by the deliberately expressed will of Congress, but as an incidental and unintended result of an act which sought merely to merge into the District Courts the Circuit Courts in which the circuit judges served, but which did not in terms deprive them of their power as judges.

Prior to the enactment of the Judicial Code, which merged the courts and vested the powers of the Circuit Courts in the District Courts, the circuit judges, as such, had jurisdictional power to issue the writ of habeas corpus, not only by virtue of the provisions of the Habeas Corpus Act (Statutes of 1867, Chapter 28, 14 Statutes at Large 385, February 5, 1867) but by virtue also of the provisions that when appointed, they were given, in the Circuit for which they were appointed, the "same power and jurisdiction therein as the justice of the Supreme Court allotted to the Circuit" (Act of April 10, 1869).

Clearly, the mere fact that a *court* is merged does not deprive the *judge* whose office still continues, of any jurisdictional power vested in him, *qua* judge. By the Habeas Corpus Act of 1867 the jurisdictional authority to issue the writ was vested in the "several courts of the United States and the several justices and judges of such courts

within their respective jurisdictions," and subsequently, on the appointment of Circuit Judges, by the Act of April 10, 1869, and the still later codification in the Revised Statutes, the jurisdictional authority to issue the writ was vested in "the Supreme Court and the Circuit and District Courts" (R. S., Sec. 751), and upon "the several justices and judges of the said courts" (R. S., Sec. 752), and again by Sections 754, 755, 757, 758, 760, 761, 762, 763 the jurisdictional power of the justices or judges is repeated.

These justices and judges are described in the Revised Statutes as "the several justices and judges of the said courts," but since they were in fact "Justices of the Supreme Court," and "circuit judges" and "district judges" this was but a short way of describing the officers in whom was vested the jurisdictional authority. The statute might as well have read, and, in the ordinary vernacular, would have read, "the Justices of the Supreme Court, the circuit judges and the district judges," or "United States Judge," as in Section 6 of the Chinese Exclusion Act of 1892, or "Judge of the United States" as in Section 1014, Revised Statutes, which would have had the same meaning as the words actually employed.

The object and purpose of the applicable provisions of the Judicial Code were to get rid of superfluous courts, court officers and records, not to circumscribe the jurisdictional power of the judges. That was quite evidently not in the mind of the Congress at all. We undertake to say that if, while the Judicial Code was under consideration in the Senate, a member of that body had risen in his place and asked the Senator in charge of the

bill whether it was intended by the proposed legislation to deprive the circuit judges of the jurisdictional authority which had theretofore been conferred upon them to issue writs of habeas corpus, a negative answer would have unhesitatingly been made.

These views are in harmony with the decision of this court in the case of *Whitney* v. *Dick*, 202 U. S., 132; for there the question was as to whether an additional jurisdictional power had been conferred upon a new court, not whether the judges composing the court had been deprived of any of the jurisdictional powers which they had theretofore exercised.

The jurisdictional powers of the court and the jurisdictional powers of the judge are distinct *U. S.* v. *Clarke*, 1 Gall., 497, 499 (STORY, *J.*). To deprive the judge of his powers should require something more than a conclusion drawn from a drily literal application of language clearly intended to deal only with the courts, *qua* courts.

We feel that it may fairly be said that never in judicial history has a judge lost any of his jurisdictional powers by implication.

In questions of great moment, it had happened in the nation's history, and it will happen again where a person has been restrained of his liberty, that a judge of the District Court has not only felt but expressed his reluctance to interfere with the committing power of another judge of co-ordinate jurisdiction. (In this respect, see the opinion of Judge WALLACE, refusing to discharge a prisoner merely because a judge of co-ordinate jurisdiction had made the commitment, *In re Hale*, 139 Fed., 496, 504). If the opinion of the Court below stands, the district judges will be more loath

than formerly to grant the writ. In such a case a circuit judge who is aloof from a district judge, would doubtless more readily exercise the power, although it were in reality the identical power drawn from the Habeas Corpus Act. The only "other and appropriate sources of judicial power" (*Matter of J. A. Tracy, Petitioner,* 249 U. S., 551) are Justices of the Supreme Court and the Supreme Court, itself, which should be relieved of such applications whenever possible.

The Constitution, Clause 2, Section 9, Article 1, provides that

> "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

The First Judiciary Act of September 24, 1789, Statutes at Large, Section 14, provided as follows:

> "Section 14. And be it further enacted, That all the before-mentioned courts of the United States (Supreme Court, Circuit Courts as then constituted and District Courts) shall have power to issue writs of scire facias, habeas corpus and all other writs * * * necessary for the exercise of their respective jurisdiction and agreeable to the principles and usages of law. And that either of the *justices* of the Supreme Court, as well as *judges* of the district courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."

There was then no Circuit Judge; the office was not created until 1869.

Referring to the provisions of the Constitution, and to the Judiciary Act, just quoted, Chief Justice MARSHALL said:

"Acting under the immediate influence of this injunction (of the Constitution), they must have felt, with peculiar force, the obligation of providing efficient means by which this great Constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.

"It may be worthy of remark that this Act was passed by the first Congress of the United States sitting under a Constitution which had declared 'That the privilege of the writ of habeas corpus should not be suspended unless when, in cases of rebellion or invasion the public safety may require it.'"

Ex parte Bollman, 4 Cranch, 74.

It will be observed that by this Act of 1789 the power to issue such writs was confined with respect to justices and judges, as distinguished from courts, to Justices of the Supreme Court and Judges of the District Court. At that time there were no Circuit Judges *eo nomine.* The Statute of 1789 is important as the first step in the development of the law.

"Chief Justice MARSHAL, in *Bollman's* case, construed this branch [the 14th section] of the Judiciary Act [of 1789] to authorize the courts *as well as the judges* to *issue* the writ."

Ex parte MILLIGAN, 4 Wall, 2, 110.

After the Act of 1789 came:

Statutes of 1833, Chapter 57, Section 7, 4 Statutes at Large, 634:

"And be it further enacted that either of the Justices of the Supreme Court or a Judge of any District Court of the United States in ad-

dition to the authority already conferred by law, shall have the power to grant writs of habeas corpus."

There were not yet any Circuit Judges *eo nomine*. The first statutory provision fully covering habeas corpus, known generally as the Habeas Corpus Act, was Statutes of 1867, Chapter 28, 14 Statutes at Large, 385, February 5, 1867:

> "That the several courts of the United States and the several justices and Judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States; and it shall be lawful for such persons so restrained of his or her liberty to apply to either of said Justices or Judges for a writ of habeas corpus * * * said Justice or Judge to whom such application is made shall forthwith award a writ of habeas corpus unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States."

The Statute of 1867 came before this Court for construction in the case of

Ex parte McCardle, 73 U. S., 318, 325.

Chief Justice CHASE, referring to the first section of the Act, said:

> "The first section gives to the several courts of the United States and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the

Constitution, or of any treaty or law of the United States.

"This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of *every judge* every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

The following language of Justice BREWER in *Whitney* v. *Dick*, 202 U. S., 132, 136, is also significant:

"It is doubtless true that if the language of the Court of Appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of *habeas corpus*, the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *Ex parte Bollman*, 4 Cranch, 75. The fourteenth section of the original judiciary act contained this language: 'That all the beforementioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' And the question presented was whether the grant of power to issue a writ of *habeas corpus* was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice MARSHALL, delivering the opinion of the court, partly on the grammatical construction of the section and partly on the significance and importance of the writ itself. But in the Courts of Appeals act there is no mention of *habeas corpus*, no

> language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing."

(Certain provisions of the Act of 1867 relating to appeals from the Circuit Court to the Supreme Court of the United States were repealed by the Act of March 27, 1868 (15 Statutes at Large, 44), but such repeal is unimportant to the consideration of the precise point before the Court in the instant case. Moreover, the repealing clause of the Act of 1868 disappeared by the amendment of the Act, March 3, 1885.)

The next act of importance is that of April 10, 1869, entitled "An act to amend the Judicial system of the United States," *providing, for the first time, for the appointment of Circuit Judges.*

Section 1 provided for the increase of the number of Supreme Court Judges to nine.

Section 2 provided as follows:

> "That for each of the nine existing Judicial Circuits there shall be appointed a Circuit Judge who shall reside in his Circuit and shall possess the same power and jurisdiction therein as the Justice of the Supreme Court allotted to the Circuit."

By the terms of this Act there was conferred on Circuit Judges all powers theretofore possessed by Justices of the Supreme Court, including the power to issue writs of habeas corpus. No Circuit Judges having been appointed at the time that the Habeas Corpus Act of 1867 went into effect, the language of that Act: "The several Justices and Judges of such Courts within their respective jurisdictions," did not apply to Circuit Judges at the time of the passage of the Act. But when the Cir-

cuit Judges were appointed by the Act of 1869, quoted above, there was conferred upon them all of the powers of Supreme Court Justices within their respective Circuits and there was equally and coincidentally conferred upon them the power to issue writs of habeas corpus, which always inhered in the office of Supreme Court Justice.

The Circuit Judges received a baptism of power to issue this writ at the moment of their appointment; and this power did not originate in or spring from any Court.

The Act of 1869, providing for the appointment of Circuit Judges, was re-enacted in substance in Section 607 of the Revised Statutes and read as follows:

> "For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court, allotted to the circuit * * *. Every circuit judge shall reside within his circuit."

We return now to the main thread of the statutory enactments relating to this subject.

The Habeas Corpus Act of 1867 was transposed into the Revised Statutes of 1873-1874 and became Sections 751 and 752, differing but slightly in phraseology.

It will be observed that the words of the Habeas Corpus Act of 1867, reading as follows:

> "That the several courts of the United States and the several Justices and Judges of such courts within their respective jurisdictions," etc.

were split into two sections by the Revised Statutes of 1873-1874 and became:

> "Section 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus."

and

> Section 752. The several Justices and Judges of the said Courts, within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

Under familiar canons of construction of Statutes, the revision of the language of the Habeas Corpus Act, without any apparent intention to change its effect, brought about no substantial change in the law, so that the specification of the several courts of the United States as: "the Supreme Court and the Circuit Court and District Courts" meant substantially what it did in the first place in the Habeas Corpus Act of 1867, namely, that the power was conferred upon the "several Justices and Judges of such courts," to wit, the Supreme Court and the District Courts, as expanded by the Act of 1869, appointing Circuit Judges and giving them the same power, within their jurisdiction, as Supreme Court Justices.

There never has been an express change in the Habeas Corpus Act of 1867 except in its revision by the Revised Statutes. The word "Circuit" has been bracketed by compilers to indicate that it has been omitted, in the enumeration of the courts, in various annotated compilations of the laws of the United States, but *has not been physically struck out of the section.* The Habeas Corpus provisions remain exactly as they were.

(For purposes of historical completeness we may make mention, in passing, that on August 29, 1842, there was adopted Chapter CCLVII, known as 5

Statutes at Large, 539, but it is not directly important to the subject in hand. Its terms are limited to "subjects or citizens of a foreign State.")

This Court has shown no tendency to restrict the "appropriate sources of judicial power" to issue the writ.

In the Matter of J. A. Tracy, petitioner, 249 U. S., 551, *per curiam,*

> "For the purpose of redressing assumed violations of the Constitution and laws of the United States *by means* of habeas corpus, the jurisdiction *of other competent courts* to afford relief *may not be passed by* and the original jurisdiction of this Court be invoked in the absence of exceptional conditions justifying such course (*Matters* v. *Ryan,* 249 U. S., 375, *ante*).
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> "When leave to file the petition for habeas corpus was previously denied, without a suggestion as to the existence of any exceptional condition which would have justified a contrary view, such refusal presumably was based on *the existence of the right to seek, if desired,* other and appropriate sources of relief. From this it follows that although we pass the application of the doctrine that the refusal of habeas corpus is not the thing adjudged, precluding a subsequent granting of such writ upon the same facts, nevertheless there is here no reason to grant the order prayed, since the previous order rested upon *the right and duty to petition for relief, if habeas corpus was desired, to other and appropriate sources of judicial power.*" (Italics ours.)

What are the "other and appropriate sources of judicial power" thus referred to? Are they confined to District Courts and District Court Judges, in view of the broad general grant in the Habeas Corpus Act of power to "the several courts of the

United States and the several Justices and Judges of such Courts"? Or do such sources include Circuit Judges?

What reason has been suggested or can be suggested why Circuit Judges, who, from the time of their creation, possessed, enjoyed and exercised, in numberless cases, the right and duty to issue the writ of habeas corpus, should be stripped of that right? It cannot have resulted from the mere fact that the Circuit Judges sit in a Court of Appeals. The Circuit Judges are just as competent now as they have always been to issue the writ. If they have lost the right, it must have been by indirection.

The question presents three aspects:

1. What was the meaning of the Judiciary Act of 1789, confirmed by the Act of 1833, giving the power to issue the writ to Justices of the Supreme Court and to Judges of the District Courts, as expanded by the Law of 1869 conferring on the newly appointed Circuit Judges the same power and jurisdiction, within their respective jurisdictions, as Justices of the Supreme Court?

2. Is there any doubt that the Habeas Corpus Act of 1867 conferring the right on Justices of the Supreme Court and Judges of the District Courts, was expanded by the Act of 1869 conferring on the Circuit Judges, within their jurisdictions, the same powers as Supreme Court Justices? The Habeas Corpus Act has never been changed in substance; it has been merely codified in the Revised Statutes.

3. Was any repeal of the power of Circuit Court Judges to issue the writ effected by the Judicial Code, merging the Circuit Court into the District Court?

A very material consideration, we submit, is that when Circuit Judges were created no new Court was created—the Circuit Court was already in existence. The Circuit Judges took their places on the bench of the Circuit Court, not by any express designation or direction, but merely as having the same jurisdiction and powers, within their respective areas of jurisdiction, as the Supreme Court Justice allotted to the Circuit. As the Circuit Judges did not derive their origin from a Court, it is hard to see how they could lose any of their powers or jurisdiction, as Judges, by the abolition or merger of the Court in which they mostly sat.

The holding of the lower Court is, in effect, that by the abolition or merger of the Circuit Court, the Circuit Judges were shorn of all of their powers —nothing was left to them except their bare titles —and that they were re-clothed with the power, and only with the power, to sit on the bench of the Circuit Courts of Appeal.

We know that they retained jurisdiction to sit under the Expedition Act (*Ex parte United States,* 226 U. S., 420, 423). Furthermore, they retained jurisdiction to sit under the Chinese Exclusion Act of 1892, § 6: "The designation of the Judge, in general terms, as 'a United States Judge' is an apt and sufficient description of a Judge of a Court of the United States, and is equivalent to or synonymous *with the designation, in other statutes, of the Judges authorized to issue writs of habeas corpus,* or warrants to arrest persons accused of crime" (citing Rev. Stat., §752, 1014; *Fong Yue Ting* v. *United States,* 149 U. S., 698, 728). The Circuit Judges are comprehended within the category of "any Justice or Judge of the United States"

in § 1014 of the Revised States relating to the arrest and holding or bail of persons accused of crime. They also may, without designation, grant injunctions or restraining orders in cases pending in the District Courts of their Circuits (*Judicial Code,* § 264) and upon designation by the President, act as a Judge of the Court of Customs Appeals (*Judicial Code,* § 188). As the Circuit Judges retained these several powers as Judges, under the separate acts conferring them, notwithstanding the abolition or merger of the Circuit Courts by the Judicial Code, how can it be said that they were, by the Judicial Code, shorn of the power conferred by the separate Habeas Corpus Act, unrepealed, to issue the great writ, which they had exercized in numberless instances covering over half a century, of which *Carper* v. *Fitzgerald,* 121 U. S., 87; *McKnight* v. *James,* 155 U. S., 685; *Lambert* v. *Barrett,* 157 U. S., 697; *In re George Macdonnel,* 11 Blatchford, 79; *Ex parte Schmeid,* 1 Dillon, 587; *In re King,* 51 Fed., 434; *Ex parte Davis,* 112 Fed., 139, and *Ex parte Jacobi,* 104 Fed., 681, are instances. How can it be said that, when acting as Circuit Judge, Judge MANTON was acting solely as a Judge of the Circuit Court of Appeals (Opinion of Court below, Record, fol. 3414).

A general act does not repeal a special act, unless the intention clearly appears (*Ex parte United States,* 226 U. S., 420).

Within the necessarily narrow limits of a brief on such an application as this we have confined ourselves to the presentation of the point involved without elaborate argument.

We submit that there is no escape from the proposition that if, by the Judicial Code, the Circuit Judges were stripped of the power to issue

habeas corpus, it was only because they were stripped of all of their powers, and since then have had only such powers and jurisdiction as they were re-clothed with by the Judicial Code.

In this age the tendency of judicial interpretation is to expand rather than contract the capacity and usefulness of Judges. There is certainly need for their utmost activity, and we have been admonished ever since the time of Marshall that it can be no better employed than in giving effect to the Habeas Corpus Act, lest the means failing the writ itself would be lost.

The point of the jurisdiction and power of a Circuit Judge to issue a writ of habeas corpus is necessarily involved, for only by holding that he had no such jurisdiction or power, and that the order was an order of the District Court, did the Circuit Court of Appeals maintain jurisdiction to hear and decide the appeal.

So long as the order discharging the Comptroller remained effective, the capacity in which Judge MANTON had acted, whether as Circuit Judge or under designation to perform the duties of a District Judge, did not appear to be important, and the question seemed to be a moot one.

But now that the Circuit Court of Appeals has based its own jurisdiction to entertain and decide the appeal solely upon the ground that the order is an order of the District Court, and is not an order of a Circuit Judge, because of lack of power in a Circuit Judge to make the same, the whole case hangs on the proper decision of the question whether a Circuit Judge has such power.

POINT III.

The decisions are uniform that no appeal to the Circuit Court of Appeals lay from an order of a Judge; that only an order of a Court might be reviewed by appeal or writ of error.

Carper v. *Fitzgerald,* 121 U. S., 87;
In re Lennon, 150 U. S., 393;
McKnight v. *James,* 155 U. S., 685;
Lambert v. *Barrett,* 157 U. S., 697;
Ex parte Jacobi, 104 Fed., 681;
Harkrader v. *Wadley,* 172 U. S., 148.

It makes no difference, in considering this point, whether the order was that of a Circuit Judge or of a Judge designated to perform the duties of a District Judge—it is still a Judge's order.

The making of a Judge's order in a habeas corpus proceeding is distinctly provided for in the Revised Statutes.

Section 752 provides:

> "The several justices and *judges* of the said Courts within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." (Italics ours.) (See also quotation from *Ex parte Milligan, supra,* at page 17).

Section 761 provides:

> "The Court, or Justice or *Judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to *dispose* of the party as law and justice require." (Italics ours.)

It is, therefore, entirely clear that such a proceeding initiated by a writ issued by a judge should be continued before and decided by the judge issuing the same and that there is no provision nor expectation that a proceeding thus initiated shall be turned into a Court proceeding or that the final order shall be a Court order.

Carper v. *Fitzgerald,* 121 U. S., 87, was an appeal from an order of a Circuit Judge discharging a prisoner on a writ of habeas corpus. That was a proceeding before the Circuit Judge at his Chambers in Baltimore, Maryland. The petition was presented to the Judge in Baltimore, who directed the Clerk of the Circuit Court for the Eastern District of Virginia to issue a writ of habeas corpus and make it returnable before him at the United States Court House in Baltimore. The writ was accordingly issued, under the seal of the Court, the usual form of Circuit Court writs, and made returnable

> "before the Honorable HUGH L. BOND, Judge of our Circuit Court of the United States, for the Eastern District of Virginia, sitting at the United States Court House, Baltimore, Maryland."

The record showed that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto, upon consideration of which an order of discharge was entered. At the foot of this order was the following:

> "And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said Court.—HUGH L. BOND, Circuit Judge."

From that order the jailer was allowed an appeal to this Court by the Circuit Judge, and the case was docketed in this Court as "An appeal from the Circuit Court of the United States for the Eastern District of Virginia," but this Court refused to regard it as such.

Mr. Chief Justice WAITE delivered the opinion of the Court (page 89), as follows:

> "The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under Section 752 of the Revised Statutes, before the Judge sitting as a Judge, and not as a Court. The Act of March 3, 1885, C. 353, 23 Stat., 437, gives an appeal to this Court in habeas corpus cases only from the final decision of a circuit court.
>
> "The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S., 708, adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the Act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes."

The procedure and practice followed in the instant case was exactly that adopted by Judge BOND in the case referred to, except that Judge MANTON directed the order to be filed in the office of the Clerk of the District Court (the office of Clerk of the Circuit Court having been abolished) and the Clerk of the Circuit Court of Appeals having, mani-

festly, nothing to do with the safe keeping of such an order. Judge MANTON'S decision directed that the papers be "filed" in the office of the Clerk of the District Court and that it be "recorded" in said Court—the words "filed" and "recorded" being the exact ones used in *Carper* v. *Fitzgerald*.

In the instant case the Court gave an entirely different significance to the use of those words saying, in the opinion of ROGERS, *C. J.*:

> "Whatever doubt one might otherwise entertain as to the capacity in which he was acting at the time seems to be put at rest by the order which he made and which required 'that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York and that they be recorded in said court.' As a Judge of the Circuit Court of Appeals he would not have directed the papers to be filed with the Clerk of the District Court and that they be recorded in that Court, but would have filed them in the office of the Clerk of his own court and ordered them to be there recorded." (Record, fols. 3421-3423.)

In the first place the Judge was not acting as a "Judge of the Circuit Court of Appeals," but as a Circuit Judge, and for that reason it would have been manifestly improper to direct that the papers be filed in the office of the Clerk of the appellate court. Nor does a Circuit Judge function only as a judge of the Circuit Court of Appeals. As there is no longer a distinct Circuit Court nor a Clerk of a Circuit Court, there was no place to file or record them in other than the office of the Clerk of the District Court, now fulfilling the functions of successor. The office of the Clerk of the District Court has not been limited to receiv-

ing, for record, the papers in actions and proceedings pending in the Court (see 28 Stat. at L. 619-20, subdiv. 5; Copyright Law of 1831, 4 Stat. at L. 437, Section 4, Act of February 3, 1831, C. XVI).

No mention is made of the decision of this Court in *Carper* v. *Fitzgerald* (*supra*) in the opinion of the Circuit Court of Appeals, nor of any of the other cases at the head of this point, all of which were pressed on the attention of the Court. They were either passed by or completely misapprehended.

Neither the filing of the order nor the recording of it changed its character from that of a Judge's order, as we have seen by the case last cited.

It is proper to note in passing, that the Act known as the Habeas Corpus Act referred to in the foregoing opinion of *Carper* v. *Fitzgerald,* has never been repealed or expressly amended in its phraseology with respect to any matter now under consideration. The annotators of the Statutes have, however, assumed from time to time to excise from or interpolate in several editions of the Revised Statutes, embracing the Habeas Corpus Act, such words as they deemed appropriate to the changes wrought by the Acts of 1891 and 1911, especially relating to the abolition of the Circuit Court.

It is noteworthy in considering the direction and effect of the case last cited that it was an appeal from an order discharging a prisoner on a writ of habeas corpus, as in the instant case, and that it was a proceeding before a Circuit Judge at his Chambers, as in the instant case.

It is also noteworthy that that decision was arrived at notwithstanding the rule of this Court which appeared to recognize that an appeal would lie *in some cases* or under *some* circumstances from the final decision of a judge, as well as from the

final decision of a Court, discharging the writ or discharging the prisoner, as the case might be. The point of the decision was that it would not lie from an order of a Circuit Judge.

If it be urged that a Judge's order is not, or ought not to be, beyond judicial review, a ready answer may be found in pointing out that such an order may be reviewed by writ of certiorari issuing from this Court. The special office of such a writ of certiorari is to redress excesses of jurisdiction by a Judge (*Whitney* v. *Dick*, 202 U. S., 132).

In *McKnight* v. *James*, 155 U. S., 685, a proceeding was begun by a petition in habeas corpus to the Circuit Court of Franklin County, Ohio, setting forth that the petitioner McKnight was unlawfully deprived of his liberty in the Ohio penitentiary.

Under this petition a writ of habeas corpus was granted by a Judge of the Circuit Court of Ohio, Second Judicial Circuit, and the petitioner was ordered to be produced before him in Columbus. The case was heard upon the pleadings and testimony by the Circuit Court Judge sitting in Chambers, and an order made that McKnight be remanded to the custody of the warden. Whereupon the petitioner sued out this writ of error directed to the Judge by name.

After referring to the Revised Statutes, Section 709, the Court, Mr. Justice BROWN writing (at page 687), said:

> "We held, however, in *Carper* v. *Fitzgerald*, 121 U. S., 87, that an appeal did not lie to this Court from an order of a circuit judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of habeas corpus, for the reason that the Act of March 3, 1885 (C. 353,

> 23 Stat., 437) gave an appeal to this Court in habeas corpus cases only from the final decision of a Circuit *Court;* and that Rule 34 did not make his decision as judge a decision of the *court,* the purpose of that rule being to regulate appeals to the Circuit Court from the final decision of any court, justice or judge inferior to that court, as well as appeals from the final decision of such Circuit Court to the Supreme Court." (Italics ours.)

Had the lawmakers, confronted as they were by the decision in *Carper* v. *Fitzgerald,* intended to confer jurisdiction upon the Circuit Court of Appeals to review an order of a Circuit Judge in habeas corpus, they would have said so in terms or effect by readopting, in appropriate form, the provisions of Sections 763 and 764, or have embodied them in Sections 128 and 238 of the Judicial Code, instead of making the two sections last cited the exclusive confines of appellate jurisdiction (*Cross* v. *Burke,* 146 U. S., 82).

Not only is there no longer a Circuit Court before whom an order of inferior Judge may be reviewed, but the Statute (Sec. 763, R. S.) was not amended so as to change the title of the Court therein specified to that of the Circuit Court of Appeals. The language of Section 763 remains bare and unchanged in phraseology, though deprived of force (*In re Lennon,* 150 U. S., 393; *Cross* v. *Burke, supra*).

In the case of *Lambert* v. *Barrett,* 157 U. S., 697, Theodore Lambert "presented to one of the Judges of the Circuit Court of the United States for the Third Circuit at Chambers on December 28, 1894, his petition for habeas corpus."

The Circuit Judge to whom the petition was presented, upon consideration thereof and the matters

therein set forth, refused to issue the writ; whereupon an appeal from the order denying the application was allowed, but was dismissed by this Court, Mr. Chief Justice FULLER saying:

> "Moreover, the order from which the appeal was taken was not a final decision of the Circuit Court of the United States for the District of New Jersey, but was an order of the Circuit Judge at Chambers, and an appeal from such an order will not lie."

In *Harkrader* v. *Wadley,* 172 U. S., 148, 162, this Court, by Mr. Justice SHIRAS, said:

> "It is, indeed, true, as was decided in *Carper* v. *Fitzgerald,* 121 U. S., 87, that no appeal lies to this Court from an order of a circuit judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of habeas corpus. But this record discloses that, while the original order was made at Chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the circuit court at a stated term, and therefore the case falls within *In re Palliser,* 136 U. S., 257, 262."

The very basis of the appeal in the instant case was that it was an order of a Circuit Judge (Vide Assignments of Error, Record, fol. 5).

The assignment of errors referred to the order appealed from as an order of the Circuit Judge. The order was neither referred to in the assignment of errors as an order of the District Court, nor any error assigned presenting the order for review as an order of the District Court. The Court below, in treating and holding the order as an order of the District Court to maintain its foothold of jurisdiction and reversing it as such, proceeded

without any assignment of error raising any such point.

The statute confers no power on the Circuit Court of Appeals to review the action of a Circuit Judge.

If it be granted for the sake of the argument, that the order is the order of a Circuit Judge, regardless of his designation to perform the acts of a District Judge, and that he had no power as a Circuit Judge to issue a writ of habeas corpus, the Circuit Court of Appeals had no authority whatever to review the order or decision of a Circuit Judge.

The distribution of the appellate jurisdiction of the United States Courts and the purposes that were intended to be accomplished by sections 128 and 238 of the Judicial Code, namely, to closely confine the jurisdiction of the Circuit Court of Appeals and to closely limit appeals to the Supreme Court, respectively, need not be dilated upon (*McLish* v. *Roff*, 141 U. S., 661).

When Congress by the Act of 1891, in part, and wholly in 1911, set up the new appellate court, it did not attempt to strip the circuit judges of all of their powers except to sit upon the bench of the appellate court and to be designated to sit in an inferior court; it contented itself by abolishing the Circuit Court and by specifying that the Circuit Judges who sit in the Court of Appeals might be designated to sit also in the District Court.

If it be argued that Congress overlooked the possible exercise of the power by a Circuit Judge after the creation of the Circuit Court of Appeals, such an oversight cannot, by any stretch of argument, create or imply jurisdiction to review its exercise by a Court of Appeals not expressly authorized so to do.

It is axiomatic that the jurisdiction of the Circuit Court of Appeals is purely statutory. The definition by BAKER, *Circuit Judge,* of the jurisdiction of a trial Court of the United States is appropriate as well to a Circuit Court of Appeals: "A court sharply restricted both as to persons and subject matters."

These cases go upon the ground that the sole jurisdiction conferred on the appellate courts is to review the final orders of courts below by appeal or writ of error, no jurisdiction having been conferred to review a judge's order. One reason for that, and perhaps the most applicable one, is that there is no finality in form or substance to a judge's order. In habeas corpus the discharge does not reverse the conviction, which still remains, if not utterly void as in excess of jurisdiction. Another reason doubtless is that, in rare cases of apparent abuse of power by a judge, this Court could exercise its ample jurisdiction to review by certiorari.

POINT IV.

There is a direct conflict between the Circuit Courts of Appeal for the Second and Fifth Circuits upon the appealability of the order of a Judge.

The Circuit Court of Appeals in the instant case held that: "The order sustaining the writ and ordering the discharge of Craig, and which the Judge ordered recorded in the District Court, and which is the order appealed from must be regarded as made by him under his designation to hold the District Court for the Southern District of New York and as such an appeal from that order was

properly taken to this Court." (Opinion Rogers, *C. J.* (fol. 3423), concurred in by Hough, *C. J.*, (*Record,* fol. 3479). But the order followed precisely the formula laid down in *Carper* v. *Fitzgerald,* 121 U. S., 87, in which the order was held "the order of the Judge," not "a decision" or order "of the Court" in which the papers were filed or over which the Judge presided.

The Court below in the instant case reached its conclusion, notwithstanding that the designation embraced also "the hearing and disposition of such *ex parte* and other business as may come before him during said period" (Record, fol. 2604) and notwithstanding that the writ was granted in Chambers, the District Court not being then in session and that the hearing was had in Chambers (fols. 2649-2658, 2662-2666).

By treating the order as an order of the Court instead of as an order of a Judge, the Circuit Court of Appeals ignored in its opinion the effect of the holding in *Hoskins* v. *Funk,* 239 Fed. Rep., 278, by the Circuit Court of Appeals for the Fifth Circuit, that a Circuit Court of Appeals had no jurisdiction to review an order of a *Judge,* although that case was pressed upon the attention of the Court below.

The conflict exists, nevertheless, between the decisions in the two Circuit Courts of Appeal and furnishes indubitable ground for the issuance of a writ of certiorari as prayed for.

POINT V.

This Court had exclusive jurisdiction, by direct appeal, to review the order discharging the petitioner, which was based upon a finding that the petitioner had been deprived of his liberty by an excess of power, involving the construction and application of the Constitution of the United States. The assumption of jurisdiction by the Circuit Court of Appeals warrants and requires the intervention of this Court, by *certiorari*.

The petitioner claimed that he had been deprived of his liberty without due process of law because, in the contempt proceedings the Court had proceeded without any foundation of jurisdiction, and in excess of its powers, being limited by the narrow terms of a Federal Statute to punish acts tending to obstruct the administration of justice in a pending cause, when in fact there was no matter pending calling for judicial determination, nothing *sub judice*.

The petition for writ of habeas corpus set forth (Record, fol. 126):

> "Your petitioner further alleges that said order and commitment were and are void and were made without any jurisdiction in the Court or the said Judge to make, file or enter the same and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and without due process of law and, since being taken into custody by said Marshal, as aforesaid, has been continuously so deprived of his liberty, in violation of the Constitution of the United States, and especially the Fifth Article of the amend-

ments thereof, and in violation of the laws of the United States."

The return set forth (Record, fols. 2526-2628):

> "Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

Judge MANTON in his opinion devoted himself principally to the point of absence of jurisdiction and the consequent excess of power, citing *Ex parte Hudgings*, 249 U. S., 378; *Ex parte Royall*, 117 U.S., 241; *Ex parte Lange*, 85 U. S. (18 Wall), 163; *New York* v. *Eno*, 155 U. S., 89; *In re Loney*, 134 U. S., 372; *Ex parte Siebold*, 100 U. S., 371; *Ex parte Parks*, 93 U. S., 18.

The construction or application of the Federal Constitution was thus involved. This Court, therefore, had exclusive jurisdiction of any appeal.

Judicial Code, Sec. 238;
Raton Waterworks Co. v. *City of Raton*, 149 U. S., 552;
Union & Planters Bank v. *City of Memphis*, 189 U. S., 71;
Carolina Glass Co. v. *State of South Carolina*, 240 U. S., 305, 318;
Horn v. *Mitchell*, 243 U. S., 247;
Greene v. *Louisville & I. R. R. Co.*, 244 U. S., 499;

Pierce v. *Creecy*, 210 U. S., 387;
Horner v. *United States* (1892), 143 U. S., 207;
Collins v. *Board of Control*, 219 Fed., 885;
W. S. Tyler v. *Ludlow-Sayler Wire Co.*, 212 Fed., 156;
Grammer v. *Fenton* (C. C. A., Eighth Circuit), 268 Fed., 943.

POINT VI.

The District Court acted in excess of its powers and beyond its jurisdiction, under the limited powers of a Federal Court, to punish for contempt, because the act for which petitioner was held guilty neither "obstructed" nor could possibly obstruct the administration of justice.

The letter was written nine months after the action of the Court which it criticized (Record, fols. 2199 and 3219).

It did not relate to any pending or imminent judicial act It related only to a possible *conference* of State and Municipal officials with the representatives of the railways. There was no intimidation, no threat and no consequence intimated except a failure of the proposed conference. If there was any obstruction it was of the conference, not of the Court.

The proceeding against the petitioner was brought under the Judicial Code, Section 268, the pertinent provision of which is as follows:

> "The said courts (United States Courts) shall have power * * * to punish, by fine or

> imprisonment, at the discretion of the Court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the *misbehavior* of any person in their presence, *or so near thereto* as to obstruct the administration of justice. * * *" (Italics ours.)

Under this provision there must exist (a) "misbehavior" and (b) an act "to obstruct the administration of justice."

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is the characteristic upon which the power to punish for contempt must rest."
>
> *Ex parte Hudgings,* 249 U. S., 378, 383;
> See also *Patterson* v. *Colorado,* 205 U. S., 454;
> *Toledo Newspaper Co.* v. *United States,* 247 U. S., 402.

The Circuit Court of Appeals in considering the subject matter of contempt in its opinion cited and relied upon the common law rule as laid down in the old cases. Judge ROGERS quoted from *Ex parte Robinson,* 19 Wall., 505, 510, as follows (*Record,* fols. 3464-3465):

> "The moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

But he omitted the most significant part of the paragraph from which the quotation was made, the next sentence, viz.:

> "But the power has been limited and defined by the Act of Congress of March 2, 1831."

The learned counsel for the government had made the same omission in quotation and we had called attention to the omission in our printed brief before the Court.

(a) *"Misbehavior"*: The word in the Act of 1831 (which has been re-enacted without change as Section 268 of the Judicial Code), and upon which the entire jurisdiction of the Court depends, is *"Misbehavior."* The word *"misbehavior,"* as conferring summary jurisdiction, is out of joint, sense or rational connection, utterly so, with any official act on the part of a public officer like the Comptroller of The City of New York, who, mistakenly or otherwise, is pursuing a course that relates to the subject-matter of his office and duties and is within his jurisdiction. In other words, misbehavior, however broadly construed, does not mean the wrong or wrongful exercise, or attempted exercise, of functions within the jurisdiction of the officer charged. Such acts are privileged (*Spalding* v. *Vilas,* 161 U. S., 483; *DeArnaud* v. *Ainsworth,* 24 App. D. C., 167; 5 L. R. A. [N. S.], 163; *Farr* v. *Valentine,* 38 App. D. C., 413; *Chatterton* v. *Secretary of State for India,* 2 Q. B. [1895] 189; *Dawkins* v. *Paulet,* L. R., 5 Q. B., 94; *Beatson* v. *Skene,* 5 Hurl & Nor., [Excheq.] 838). It should be recalled that the letter was, and was alleged to be (Record, fols. 2199, 156, 2192) "in response to the invitation" of one official to another (fols. 155-156), and that when Mr. Nixon had suggested the conference, counsel for the receiver had conferred with Judge MAYER and asked him whether they should attend it and carry out some important suggestions (Record, fols. 1112-1113). The statute does not mean that he, by intemperate words or expressions, has transcended the

bounds of official etiquette. In other words, *"misbehavior"* as used in the statute means the physical or oral act of some person who is misbehaving in the ordinary sense of the word.

(b) There was no *"obstruction,"* because there was "No Pending Judicial Determination" and none was imminent. Even though the Court be of opinion that the letter of October 6, 1919, was not absolutely privileged, as we contend it was, we submit that under the cases cited, *supra,* the letter did not tend to affect the administration of justice in a matter pending before the Court or Judge, in that it could not possibly influence any decision, for none was pending or imminent. The orders, policy and refusal had been made and taken nine months prior to the letter and were so far in the background that even an unprivileged, hostile communication thereon could not impinge on the statute, Sec. 268 of the Judicial Code, so as to give the Court jurisdiction to entertain contempt proceedings against the author on the ground that the act was misbehavior which tended to "obstruct the administration of justice." The Court's action was completed in respect of the matters which had occupied its deliberations and, being completed, the criticism of it followed, lawfully.

No act of obstruction was specified or defined in the Information or found by the conviction.

The Information set forth four respects in which it was alleged that the letter was *false,* numbered definitely 1, 2, 3 and 4.

The conviction was for "contempt of this Court *in respect of* the matters set forth in paragraphs 1, 2, 3 and 4 of the Information" (Record, fols. 2512-2516).

We submit that the legal meaning of the conviction was that the petitioner was guilty of making four false statements respecting acts of the Court, long past, nothing more. "In respect of" means in common parlance "for" or "only for."

The general conclusion that he was guilty of contempt of court in respect of those acts added nothing to the alleged offense which was simply that he had written falsely of the Court's past acts. No connection is disclosed between the alleged falsehoods and any matter then pending or imminent.

It is impossible to find any connection between the falsehoods as to the past and any present or future act of the Court, or any discernible obstruction or tendency to obstruct.

The Comptroller was held guilty of telling falsehoods out of Court. In the *Hudgings* case, *supra*, the defendant was found guilty of telling falsehoods in Court. In each instance the falsehoods lacked an obstructive characteristic.

It is not enough, we submit, to deprive the citizen of his liberty that such falsehoods were believed by Judge MAYER to have a possible or even an actual obstructive effect. The obstructive effect must really exist. "The *presence* of that element must *clearly be shown* in every case where the power to punish for contempt is exerted," as was said in the *Hudgings* case, *supra*.

Application had been made under express direction of the Board of Estimate and Apportionment for the appointment of a co-receiver in behalf of the City of New York in the railway controversy. That application had been denied and disposed of on the 22d day of January, 1919 (fol. 3219), long before the letter of October 6, 1919, was written. The Court had intimated that it might be renewed

(fols. 139-141); but it had not been renewed, and the receivership had been made permanent (fols. 3202-3219).

It is not claimed that any determination was pending or imminent.

The return to the writ of habeas corpus has settled this for all time. From paragraph Fourth of the Return, we quote (fols. 2526-2527):

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

We submit that, if it were possible under the system of pleading in a habeas corpus proceeding, the petitioner might have been discharged upon that admission in the return, standing alone.

Of course, the whole railroad situation was before Judge MAYER, but it was before him wholly in an administrative capacity; "there was not pending awaiting decision any order or judicial determination" in the language of the return.

The situation before him had none of the aspects of a judicial matter at all. It was a receivership conducted by the arm of the Court. We emphasize that it was only within the control of the Court and subject to change *if* the Court *were moved thereto* by some person. We know of no ambulatory jurisdiction of a Court, that would allow the Court to change its decisions or orders without being moved thereto by a party in interest.

As to what constitutes a subject-matter pending *sub judice*.

In the case of *Metzler* v. *Gounod,* Law Times Reports, Vol. XXX N. S., 264, Court of Common Pleas, before KEATING, BRETT and DENMAN, *JJ.*, there was a motion for a rule to show cause why an attachment should not issue against Mrs. Georgina Weldon for contempt of Court for circulating at a concert printed statements which were said to give a grossly unfair statement of the facts at a trial "at variance with those which had been sworn to." The trial had taken place, but the defendant had leave to move for a non-suit or new trial on technical grounds. It appears by the report of the case that during the argument Judge KEATING asked the following suggestive question:

> "Is not this contingent contempt? There was no trial pending."

In delivering the opinion of the Court, KEATING, *J.*, said:

> "I think there is no ground whatever for this application. It is, of course, most desirable and necessary that nothing should be done to prevent a fair trial being had when parties are once before the Court and the decision of the disputed question is still pending. The Court should be protected against any bias being created by proceedings outside, which might prejudice the litigants who are availing themselves of its process. But there is nothing of the sort here. The trial had taken place and the plaintiff had obtained a verdict and the defendant had leave to move for a non-suit or a new trial on technical grounds. The motion may or may not be made; the time has not expired; but it does not matter whether it is made or not, nothing is now pending before the Court," etc.

We know of no right in a Court to have its decree and orders subject to change without being moved

thereto by a party, and such a move by a party is what the Comptroller intended to accomplish by his letter. He intended to move *the parties thereto* to bring about some change. This cannot be made too clear. He intended to make no impression upon Judge MAYER.

He testified that that was his position (Record, fols. 1818-1824); and that the disclosure of the letter, before the newspaper men got hold of it, was furthest from his mind. Quoting his testimony on this point, we find:

> "The last thing on earth that had ever entered my head was that Mr. Nixon would be so foolish as to read that letter to the railroad attorneys that he had to negotiate with" (Record, fol. 1818).

Regardless of his testimony the letter shows upon its face that his intention was that "As a first and preliminary evidence of good faith, *those who desire* such a conference and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting the City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That shows distinctly that the impression he intended to make was upon the representatives of the railways, through Mr. Nixon, if the latter were to agree with him.

In the case of *Patterson* v. *Colorado,* 205 U. S., 454, Mr. Justice HOLMES, in delivering the opinion of the Court, said at page 463:

> "When a case is finished, the courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature

statement, argument or intimidation hardly can be denied."

The import of the statute is defined in the statement of its purpose in the opinion of Chief Justice WHITE in the *Toledo* case, 247 U. S., pp. 402, 419, where he said:

> "The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted by necessary implication, recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts *tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power* given by summarily treating such acts as a contempt and punishing accordingly. *The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty—a conclusion which necessarily sustains the view of the statute taken by the courts below* * * *." (Italics ours.)

The view taken by the lower courts in the *Toledo* case may be summarized as follows:

In *Toledo Newspaper Co.* v. *United States*, 237 Fed. Rep., 986, 990 (C. C. A.), Judge DENISON said:

> "Upon this record, the publications had reference to *pending judicial action*, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, *if one should be made*, and there is a finding that they constituted an attempt to intimidate—*at least unduly to influence*—the District Judge *with reference to his decision in the matter pending before him.*" (Italics ours.)

The above quotation from the opinion of Judge DENISON is cited with approval in the opinion of Chief Justice WHITE in the *Toledo* case in this Court, 247 U. S., 402, at page 415.

In the same case in the District Court, *United States* v. *Toledo Newspaper Co.,* 220 Fed. Rep., 458, 489, 501, Judge KILLITS said, at page 503:

> "Unless a publication plainly tends to affect the administration of a pending case, our conception of section 268 requires that it be not considered a *misbehavior,* no matter how aggravating or unfair it may be."

A close study of the record in that case shows that: There were three matters then pending before Judge KILLITS awaiting decision, each unrelated, and they were as follows:

(a) An injunction had been applied for and had not yet been granted, Judge KILLITS announcing from the bench that he would have to consider whether the Court had jurisdiction to issue the injunction.

(b) As soon as that happened, this being a big railroad fight and the question being whether the rate of fare should be three or five cents, one Quinlivan started to harangue the people on the afternoon of the day of Judge KILLITS' announcement and advised them that they should not pay any fares but ride on the cars free. In fact they did so. Judge KILLITS forthwith issued an attachment for him to show cause why he should not be punished for contempt. So that matter was a pending matter.

(c) As soon as the attachment was issued, the newspaper started a great hubbub about Quinlivan

and the Judge, and what was going to happen. As soon as that occurred, the Judge issued an attachment against Howard, the managing editor. So that was pending.

(d) With those *three proceedings pending* in the Court *sub judice,* the most violent attack of all came, and it was because of these attacks made upon him, while those three matters were under consideration, that Judge KILLITS came to the conclusion above noted.

The Circuit Court of Appeals, in its opinion, referring to this phase (237 Fed. Rep., at p. 988), said:

> "It is undisputed that the newspaper publications had reference to the general subject-matter, *some phases of which were then pending in the District Court,* and had reference to the making and effect of the injunctional order, *the application for which was then pending.* * * * There was ample jurisdiction to justify punishing any contempt committed at this stage of the case." (Italics ours.)

It follows that, in order to give jurisdiction there must be an impact, physical or verbal, which tends to obstruct the delivery of justice.

There must be a verbal or physical obstruction placed in the way of the Judge to actually prevent him from delivering or to influence him in delivering justice. Hence, when we come to apply the above principles of law to the case at bar, we find that the letter of the defendant dated October 6, 1919, signed by him in his official capacity as "Comptroller," and "in response to the invitation" (Record, fols. 155-156), set out in full in the Information, refers in its own plain terms, in every in-

stance specified, *to past action taken by District Judge* MAYER *in regard to matters which had arisen in the suits and proceedings in the Court.* The letter does not concern itself, on its face, with any pending matter in such suits or proceedings. It is true that the letter does say that "as a first and preliminary evidence of good faith, *those who desire* such a *conference* and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting The City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That, however, was a condition precedent to official, not judicial, action; it related to a possible conference of non-judicial officials, not to any pending or imminent decision by the Court. The conviction fails to predicate guilt upon that specific statement, but on the contrary confines the contempt to the alleged false statements "in paragraphs 1, 2, 3 and 4."

The Information does state that two suits and a proceeding are, and, during all the times thereinafter mentioned subsequent to the respective dates of their commencement, as thereinafter stated, had been pending in the District Court of the United States for the Southern District of New York. But nowhere in the Information is it alleged or stated that, at the time when it is charged that the defendant Comptroller wrote the letter to Lewis Nixon, Public Service Commissioner, there was pending before the District Court for deliberation or determination by Judge MAYER any motion or proceeding of any kind in either of the suits or proceedings, and the Return to the writ expressly admits that none such was pending. The abortive effort, by the voluminous court records (Record,

fols. 2667-3383), to give the semblance of a pending determination accentuates its absence. All of the opinions and acts set out in the Information were, at the time the defendant Comptroller wrote the letter, past acts, as to which the publication of the letter *could not constitute misbehavior tending to obstruct the administration of justice* within the purview of section 268 of the Judicial Code, "no matter how aggravating or unfair it (the letter) may be," to use the phrase of Judge KILLITS (quoted *supra*). It is a matter of no consequence that the Information characterizes the letter as false, and as having been written wilfully, knowingly, unlawfully and contemptuously, because there was no obstruction to the actual delivery of justice.

The *"misbehavior"* must be near the Court, not necessarily physically near in point of distance, but near in the sense that the *"misbehavior"* presents an interruption which comes between the Court and the consideration of the subject-matter then under submission, in such sort or way as to distract the mind of the Court off of, from or away from, the matter immediately under judicial consideration; or, even to divide the attention of the Court between what it ought or intended to be thinking about and deciding, and the fret or distraction occasioned by the *"misbehavior"* and the incident interruption.

As was said by Judge HAND in his dissenting opinion below: "In the somewhat analogous case of obstructing the draft, the Supreme Court laid down the rule that the words must constitute 'clear and present danger' that the evil will result," citing *Schenck* v. *United States,* 249 U. S., 47, 52 (Record, fol. 3513).

Because, therefore, of the limited effect of the facts appearing on the face of the Information itself, as adjudged in the conviction, as well, also, of the express admission in the Return, the Court, having no general jurisdiction to punish for contempt but only a limited power to punish for obstruction, acted in excess of its powers, and the proper relief was by habeas corpus, as appears in the next point.

POINT VII.

Habeas Corpus was the proper and effective remedy for excess of power or lack of jurisdiction in the commitment for asserted contempt.

Ex parte Hudgings, 249 U. S., 378:
In re Watts, 190 U. S., 1;
Cuyler v. *Atlantic & N. C. R. Co.* (*in re Daniels*), 131 Fed., 95;
In re Reese, 98 Fed., 984;
Ex parte Dock Bridges, 2 Woods, 428;
Ex parte Lange, 18 Wall, 163;
Ex parte Siebold, 100 U. S., 371;
Ex parte Fisk, 113 U. S., 713;
In re Ayers, 123 U. S., 443;
Hans Nielsen, Petitioner, 131 U. S., 176;
Cuddy, Petitioner, 131 U. S., 280, 283;
In re Mayfield, 141 U. S., 107;
Frank v. *Mangum,* 237 U. S., 308;
Ex parte Robinson, 144 Fed., 835.

A single Judge of a lower court has the same power as the Supreme Court to issue a writ of habeas corpus (R. S., Sects. 751, 752), to "proceed

in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require" (R. S., Sec. 761).

Ex parte Milligan, 4 Wall., 2, 110.

"And although it may appear unseemly that a prisoner after conviction * * * should be set at liberty by a single Judge on habeas corpus, there seems to be no escape from the law." Circuit Judge BRADLEY in *Ex parte Dock Bridges,* 2 Woods, 428, 432; referred to with approval in *Ex parte Royall,* 117 U. S., 241, at page 253.

There has been no change in the law in that respect.

That the Congress has liberalized the common law procedure on habeas corpus is frequently overlooked by Courts and counsel. In the instant case the Court below cited and quoted from a number of cases under the common law, and others, notably *Ex parte Kearney,* 7 Wheaton, 38, decided before the Act of 1831, limiting the power of Federal Courts in the punishment of contempt and also prior to the Habeas Corpus Act of 1867.

A prisoner may have a judicial inquiry in a Court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to *test the jurisdiction* of the Court to proceed to judgment against him. *Frank* v. *Mangum,* 237 U. S., 308, at p. 331.

In *Ex parte Lange,* 18 Wall., 163, 166, the Court declared that its authority.

> "to issue this writ and to examine the proceedings in the inferior Court, so far as may be

> necessary to ascertain whether that court has exceeded its authority is no longer open to question."

In *Ex parte Siebold* (*supra*) the Court not only asserted its right by habeas corpus to enquire as to (page 376)

> "clear and manifest *want of criminality* in the matter charged, such as in effect to render the proceedings void";

but that (page 377)

> "personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed conclusive, but that * * * the question of the *court's authority* to try and imprison the party *may be reviewed* on habeas corpus, by a superior court or judge having authority to award the writ."

The addition of the words "by a Superior Court, or judge having authority to award the writ," is most significant in its recognition that a single judge, under the statute, has the power and authority that the Supreme Court itself has to award the writ.

In *Ex parte Parks,* 93 U. S., 18, the Court declared a writ of habeas corpus to be appropriate and effective to enquire sufficiently to determine that (page 23)

> "no act beyond the powers conferred on it"

had been committed by the lower court, and that

> "if it (this Court) finds that the Court below has transcended its powers"

relief will be granted by this means.

In *Cuddy, Petitioner,* 131 U. S., 280, 286, which was an appeal from an order of the Circuit Court refusing a petition for a writ of habeas corpus, this Court said:

"The judgment being attacked collaterally, and the record disclosing a case of contempt, *and not showing one beyond the jurisdiction of the court,* it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, about which the record is silent, may not be overcome by evidence. *On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as,* under Section 725 of the Revised Statutes, *made him liable to fine or imprisonment, at the discretion of the Court, he would have been entitled to the writ, and, upon proving such facts, to have been discharged.* Such evidence would not have contradicted the record." (Italics ours.)

The instant case came directly within the proviso above stated.

The Information alleged that certain proceedings "have been pending in this Court" (*Record,* fols. 131-134), and further that "The said letter, as well as the publication thereof, as aforesaid, each tended and was calculated and intended by the defendant to influence this Court in its consideration of *suits* and *proceedings* aforesaid, pending when said letter was written, delivered," etc. (Record, fol. 176-177.)

The conviction or judgment went no further than the Information "as charged" (Record, fol. 2515) in the matters specified.

There was no allegation or finding that any subject-matter was pending *sub judice* or imminent, but merely that the proceedings and suits were pending.

On the other hand, the petition for the writ expressly alleged (Record, fols. 112-113):

"a. That neither on the 6th nor the 7th day of October, 1919, was there pending *sub judice* before said District Judge or said Court any matter or judicial determination in any suit or proceeding mentioned in the Information or in any suit or proceeding consolidated with any or either of such suits and proceeding.

"b. That all orders and judicial determinations which were referred to in the letter of October 6, 1919, from your petitioner to Lewis Nixon, Public Service Commissioner, set forth in the said Information, had been previously made and concluded and that no hearing was pending, awaiting determination, upon any of said orders or judicial determinations or the subject matter thereof."

And the Return to the writ set forth, as we have shown elsewhere (Record, fols. 2526-2527):

"IV. Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

The petitioner's application for the writ came, therefore, directly and exactly within the case put in *Re Cuddy* (*supra*): (a) The "record is silent" as to any subject-matter pending *sub judice*. (2) The petition alleged that there was in fact none such pending. (3) The return admitted that "there was not pending awaiting decision any order or judicial determination."

The petitioner thus met not only every requisite

mentioned in *Re Cuddy, supra,* but in the most satisfactory form showed that "new" fact or element on his application for the writ which HOUGH, *C. J.,* in his concurring opinion in the instant case, said had not been shown (Record, fol. 3482). The allegation in the Petition and the express admission in the Return were tantamount to the highest order of proof allowed and provided for by the Habeas Corpus Act (R. S., Sec. 761).

In *Hans Nielsen, petitioner,* 131 U. S., 176, 184, the Court said there must be not merely

> "jurisdiction of the cause,"

but

> "authority or power to condemn the prisoner"

lacking which

> "a party is entitled to a habeas corpus."

This thought respecting jurisdiction is also tersely expressed by Mr. Justice HOLMES with respect to a controversy which concerns a subject limited by Federal Law (as is punishment for contempt).

> "The jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the Court" (*Lamar* v. *United States,* 240 U. S., 60, 64).

In *In re Mayfield,* 141 U. S., 107, 116, the Court said:

> "This Court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record."

In *In re Belt, petitioner,* 159 U. S., 95, the Court said (at p. 100):

> "The general rule is that the writ of habeas

> corpus will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction, and that it cannot be used to correct errors. Ordinarily the writ will not lie where there is a remedy by a writ of error or appeal; but in rare and exceptional cases it *may be issued,* although such remedy exists."

This Court, in discharging a prisoner, said in *Ex parte Hudgings,* 249 U. S., 378, 379:

> "The grounds for discharge were, that the Court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible of being treated as a contempt, the action of the Court was arbitrary, beyond the limits of any discretion possessed and violative of due process of law under the Fifth Amendment."

The decision in the *Hudgings* case, *supra,* we urged below, and again urge, as determinative of the two main points involved; (a) that there was no contempt because there was no obstruction to the administration of justice, and (b) that the relief against imprisonment is by habeas corpus, where an element of obstruction is lacking.

That was an original application to this Court for a writ of habeas corpus to relieve against a contempt commitment for asserted false testimony of a witness. The application to the Court did not differ in kind from an application to a judge of a lower court, as we have seen.

So we start, in considering the *Hudgings* case, with the comprehension that Judge MANTON, either in his capacity as a circuit judge or under his designation to perform the duties of a district judge, had the same power as the Supreme Court to issue and sustain the writ.

The only difference in the procedure was that in

the instant case "testimony" was taken, as provided in the Habeas Corpus Act (R. S., Sec. 761), so as to present the whole record, while in the *Hudgings* case that was done by setting forth the proceedings in the petition, "and a transcript of the stenographer's notes showing what transpired in the Court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record" (p. 380). We may say, parenthetically, that that was the course pursued in *Cuddy, Petitioner,* 131 U. S., 280, 281.

What the petitioner asserted, in the *Hudgings* case and the Court understood him to assert, as a foothold for relief on habeas corpus, was (a) "that the Court had *exceeded its jurisdiction* by punishing as a contempt (b) *an act* which it had *no power to so punish,* and (c) that the action of the Court was arbitrary, beyond discretion and violative of due process. A clear appreciation of these points, separately, disposes, we think, of the distinctions which were suggested by the Court below in the instant case. Note the use of the expressions in the *Hudgings* case, carried throughout the opinion "exceeded" and "excess" in relation to jurisdiction and power, which are asserted here in challenging jurisdiction. The reason that those terms are appropriate is because there is no *general* jurisdiction in the United States courts to punish for contempts. Its jurisdiction is a *limited* one, since the Act of 1831; hence the expressions "excess of jurisdiction" and "excess of power" are peculiarly appropriate. In discussions of constructive contempt the statutorially limited jurisdiction of the United States courts is all too frequently lost sight of, as it was below, in the citation of English and state court cases.

Next there should be noted that Mr. Chief Justice WHITE spoke of "an act which it had no power to so punish," and later on he defined what was such an act and the incidence of power to punish. There is no general power to punish an act alleged to be contemptuous; the power to punish depends not upon an allegation of a contemptuous act, but upon its actual existence; it must fall within the statutory *proviso.* A proceeding to punish for alleged contempt is *sui generis* in the mode of accusation, the method of inquiry and even in the mode of punishment (*Creekmore* v. *United States,* 237 Fed. Rep., 743; *Merchants Stock & G. Co.* v. *Board of Trade,* 201 Fed., 20). This was referred to later on in the opinion in the *Hudgings* case (at p. 383). Because it is *sui generis,* mere allegation is not sufficient. An information may be useful to establish the confines of the inquiry, but it is not provided for in any statute relating to contempt, nor by any criminal procedure on the subject. We are told that it is a usual method, but it is more honored in the breach than the observance. It does not give jurisdiction. It is not like an indictment, nor even like an Information touching a statutory offense or a common law crime. It is not accompanied by process. The order to show cause which usually accompanies it, as in this case, has no jurisdictional force. An *act* which the Court has *power* to punish is the requisite of jurisdiction, as is clearly pointed out by Mr. Chief Justice WHITE, in the *Hudgings* case.

The Court proceeded (at pp. 379 and 380) to state the duty of the Court to consider the case as within the exception to the rule established by this Court to justify "resort to the original jurisdic-

tion of this Court." That exception has nothing to do with an application to another court or judge where such a rule does not obtain. We make mention of it only because of the suggestion in the opinion of the court below that "what was done in the *Hudgings* case was done at least by a court empowered to review and set aside erroneous judgments in appropriate proceedings." Palpably this Court was exercising its original jurisdiction.

The opinion then proceeded to state the manner in which the alleged contempt occurred, including the following (at p. 381):

> "Finally the Court interrupted the examination by saying:
>
> " 'This witness is going to be committed for contempt of court. The Court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife * * *
>
> " 'And it becomes the plain duty of the Court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the Court to explain to you that the answer, "I do not remember of ever having seen him write," is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, "I do not remember".' "
>
> "In the same direction the Court said:
>
> " 'I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this Court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it.' "

The Petition in the record of that case (pp. 25-26) contained a further transcript of what took place:

> "The Court: Tell the Court whether you care to *take any further time on this matter*, do you?
>
> "The Witness: My time is your time.
>
> "The Court: I suggest that you might *confer with counsel.*
>
> "The Witness: *No, sir,* my answers will be exactly *as they have been.*
>
> "The Court: *Very well. You are adjudged to be in contempt* of this Court and you are ordered to be committed to jail forthwith. Mr. Clerk, you prepare the commitments. You are in the custody of the marshal from now on."

No reference is made in the opinion of the Court below in the instant case to the above quotation from the record in the *Hudgings* case, which was abstracted at length in our printed brief before the Court below. On the other hand the Court below said: "In the *Hudgings* case, *without* proof of guilt, without evidence, without any hearing, the Court forthwith ordered the imprisonment," etc.

It will be observed that (a) an opportunity to confer with counsel and for purging was allowed, such as it was, and (b) that the Court below had concluded that the act did obstruct justice, though there was no written finding to that effect. Slight safeguards for the liberty of the citizen, it is true, but sufficient to require the Supreme Court to determine the main question of the "erroneous doctrine" of the power of the Court.

This Court stated the question as follows in the *Hudgings* case:

> "Whether, then, power to punish for contempt exists in every case where a court is of

the opinion that a witness is committing perjury is the test we must here apply" (p. 382).

The procedural points and the punishment were passed by in the determination of the great principle involved. That appears in the language of the opinion (at p. 383):

> "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to *modes of accusation* and *methods of trial* generally safeguarding the rights of the citizen." (Italics ours).

Had the Court intended to rest its decision either on the mode of accusation or the method of trial, the language quoted would have been quite beside the mark.

The opinion proceeds:

> "This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and *only purpose* is to secure judicial authority from *obstruction in the performance of its duties* to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." (Italics ours). (Citing *Toledo Newspaper Co.* v. *United States*, 247 U. S., 402; *Marshall* v. *Gordon*, 243 U. S., 521.)
>
> "An obstruction to the *performance* of judicial duty *resulting from* an act done in the presence of the Court is, then, *the characteristic* upon which *the power* to punish for contempt *must rest.*"

We have, then, (1) the purpose—the only purpose; (2) the characteristic act, and (3) the result, on which (4) the power must rest.

"Obstruction"—is the monumental thing.

We turn now to the point of next importance, stated at the head of this point: The exertion of the power, and means of enquiring into it by habeas corpus.

The Court, following on directly from the language above quoted, said (at p. 383):

> "This being true, it follows that the *presence* of that element *must clearly be shown* in every case where the power to punish for contempt is *exerted*—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty."

The predicate, upon which the Court granted the writ and discharged the petitioner, was that when a commitment is attacked upon the ground "that the court had exceeded its jurisdiction," the *presence, i.e.,* the *existence* of the element of an obstruction to the performance of judicial duty *must clearly be shown,* where the power has been exerted. Not merely that it must be charged, generally or indefinitely, but must be shown to exist.

This is made plainer still by the next paragraph of the opinion (at p. 384):

> *"Testing the power to make the commitment* which is under consideration in this case by the principles thus stated, we are of the opinion that the *commitment was void for excess of power*—a conclusion irresistibly following from the fact that the *punishment was imposed for* the supposed perjury alone without any reference to any *circumstance or condition* giving to it an obstructive effect."

The conclusion of the Court that the punishment was imposed "without any reference to any circumstance or condition giving to it an obstructive effect" was directly in the face of the pronouncement of the Judge below, which we have quoted from the report of the case at page 381:

> "I am not going to allow you to obstruct the course of justice here."

That was passed by, as the order or finding of Judge MAYER, that the petitioner was guilty "as charged" solely *in respect of such false statements,* should be passed by, to ascertain whether the presence or existence of an obstructive act was "clearly shown."

Far from being clearly shown in the instant case, there is an express admission in the Return (Record, fols. 2526-2528):

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

With that admission in the Return the instant case is stronger for the petitioner than was the *Hudgings* case for the petitioner there. In *Hans Nielsen,* petitioner, 131 U. S., 176, at p. 183, the Court said: "In the present case it appeared on the record in the plea of *autre fois convict,* which was admitted to be true by the demurrer of the government. We think that this was sufficient." In the present case the express admission in the Return is as strong as an admission of fact flowing from a demurrer.

Does the all-important expression in the *Hudg-*

ings case that we have quoted, with the context (*supra*), "Testing the power to make the commitment," mean less or other than that it is the office of this great writ, and of the Court or Judge issuing it, to test the power, by that means and in that way, to make the commitment by looking into the record deep enough to ascertain whether the presence—not merely the charge or opinion—of an obstruction to judicial duty was clearly shown.

And why should that not be so? A citizen, in this case a public official who is presumably trying to do his duty—even if mistakenly—in the same way as the Judge is trying to do his, is haled into court upon an assertion that he has obstructed the Judge in the performance of his judicial duty; the charge is directed by the same Judge and tried before the same Judge, against the protest of the citizen that another Judge be designated to hear the proceeding, and he is committed for a long period. Why should not some other judge or set of judges forthwith test the commitment by enquiring whether the presence or existence of the act of obstruction was clearly shown, and not merely that the accusing Judge, who was also the Trial Judge, thought that an obstruction was intended. If all of the ordinary modes of accusation and methods of trial are laid aside to preserve the integrity of the administration of justice, ought not the presence or existence of the obstruction be required to "clearly be shown" in a like summary way before another judge or judges, in "every case," as Chief Justice WHITE used those terms?

The principal reason why an inquiry in a contempt case into the jurisdiction is proper by habeas corpus proceedings, is that the jurisdiction of the United States Courts, since the act of 1831, follow-

ing the Peck controversy, is not a general jurisdiction, but a limited jurisdiction, dependent in every case upon a proviso embodied in the Statute. While, therefore, there is inherent power in the United States Courts to punish for contempts, it is a limited power, and for that reason may be examined into in "every case."

Here the Court below said: "In the present case sentence was imposed at the end of legal proceedings of a thorough and deliberate nature," etc. That the legal procedure has been deliberate and thorough has nothing to do with the principle involved. Analogy or lack of analogy does not depend on speed or brusqueness.

The *Hudgings* case did not rest on lack of deliberateness, or thoroughness, or exceptional expedition. We have already pointed out that, in the opinion in that case, emphasis was laid upon the fact that the ordinary methods of accusation and trial might be dispensed with in contempt cases.

The concluding comment of the Court below in the instant case (Record, fols. 3460-3461):

> "We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ of error but must be limited to jurisdictional questions,"

shows a disregard of the main attack made by us upon the conviction which is upon jurisdictional grounds; our position is and has been always that the general procedure in a contempt case where the Court lacks jurisdiction, or has exerted "excess of power," is to proceed by a writ of habeas corpus and not by writ of error. That has been held so many times in the cases cited in this brief, especi-

ally those at the head of this Point, that no useful purpose would be served by citing them again.

In *Ex parte Lange,* 18 Wall., 163, 165-178:

> "On consideration of the petition, which was filed in this case at a former day, the Court was of opinion that the facts therein recited very fairly raised the question whether the Circuit Court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its powers. It therefore directed the writ to issue, accompanied also by a writ of certiorari, to bring before this Court the proceedings in the Circuit Court under which the petitioner was restrained of his liberty. The authority of this Court in such case, under the Constitution of the United States, and the 14th section of the Judiciary Act of 1789, to issue this writ, and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that Court has exceeded its authority, is no longer open to question. The cases cited in the note below (*Hamilton's case,* 3 Dall., 17; *Burford's case,* 3 Cranch, 448; *Ex parte Bollman,* 4 Cranch, 75; *Ex parte Watkins,* 3 Pet., 193; S. C., 7 Pet., 568; *Ex parte Metzger,* 5 How., 176; *Ex parte Kaine,* 14 How., 103; *Ex parte Wells,* 18 How., 307; *Ex parte Milligan,* 4 Wall., 2; *Ex parte McCardle,* 6 Wall., 318; S. C., 7 Wall., 506; *Ex parte Yerger,* 8 Wall., 85) will, when examined, establish this proposition as far as judicial decision can establish it.
>
> "Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writs of habeas corpus or otherwise, we proceed to examine the case as disclosed by the record of the Circuit Court and the return of the marshal, in whose custody the prisoner is found, to ascertain whether it shows that the

Court below had any power to render the judgment by which the prisoner is held.

* * * * * * * *

"There is no more sacred duty of a Court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

In *Hans Nielsen, Petitioner,* 131 U. S., 176, at p. 184, Mr. Justice BRADLEY said, delivering the opinion of the Court reversing, on appeal, a final order refusing to issue a habeas corpus, and directing that a writ issue:

"A party is entitled to a habeas corpus, *not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.* As said by Chief Baron GILBERT, in a passage quoted in *ex parte Parks*, 93 U. S., 18, 22: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord HALE laid down the same doctrine in almost the same words (2 Hale's Pleas of the Crown, 144). *And why should not such a rule prevail in favorem libertatis?* If we have seemed to hold the con-

> trary in any case, it has been from inadvertence."

This case is most valuable, for there could be no doubt that the Court had jurisdiction of the cause, viz., the crime of unlawful cohabitation for which he was convicted and punished, but the Court sustained the writ upon the ground that the Court below had no constitutional authority or power to condemn the prisoner, for the reason that the crime of adultery with which he was charged, although on different dates, was included in the crime of unlawful cohabitation. For that purpose the Court went behind the record and looked into the facts, saying in conclusion (pp. 190-191):

> "The Court was without authority to give judgment and sentence in the latter case, and should have vacated and set aside the same when the petitioner applied for a habeas corpus."

CONCLUSION.

It is respectfully submitted that the prayer of the petitioner should be granted for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit (Petition, page 29), to the end that the case may be reviewed and determined by your Honorable Court, and that the judgment of the said Circuit Court of Appeals and every part thereof, may be reversed by your Honorable Court.

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Corporation Counsel,
Of the City of New York,
Attorney and Counsel for Petitioner.

EDMUND L. MOONEY,
Of Counsel.

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Supreme Court of the United States

CHARLES L. CRAIG
Petitioner,

against

WILLIAM C. HECHT, United States Marshal for the Southern District of New York,
Respondent.

83 OCTOBER TERM, 1923.

BRIEF ON BEHALF OF THE PETITIONER ON WRIT OF CERTIORARI

The petitioner, who is the Comptroller of the City of New York, was charged with contempt of Court for certain expressions criticizing the action of District Judge MAYER, now Circuit Judge, in connection with receivership proceedings of the traction lines of the City of New York, which had been instituted in the District Court for the Southern District of New York. The letter is set forth in the Information (Record, fols. 156-167, pp. 52-56) and was as follows:

"October 6, 1919.

"Hon. Lewis Nixon,
Public Service Commissioner,
No. 49 Lafayette Street,
New York City.

Dear Sir:

Replying to your letter of October 1st:

Apparently without inquiry and without information, you have fixed the time for the proposed conference upon a date which, if observed, would require the members of the Fi-

nance and Budget Committee of the Board of Estimate and Apportionment (comprising the entire Board), to drop the preparation of the largest budget in the history of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late.

In your letter you say:

'It may be necessary to review figures and examine leases and agreements that will consume time.'

Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge MAYER, there must be a reversal of the policy for which Judge MAYER is responsible, of denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York.

When the applications were made to Judge MAYER in the 'friendly' proceedings instituted by those interested in these corporations for the appointment of a Receiver of their own liking, if not of their own selection, the Corporation Counsel of the City of New York acting under instructions from the Board of Estimate and Apportionment given at my instance, urged upon Judge MAYER that he appoint an additional or co-receiver acceptable to the Board of Estimate and Apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the Court would be fair and just to The City of New York, and the members of the Board of Estimate and Apportionment might be accurately informed with respect thereto in order that

any action deemed necessary by the City might be taken.

As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests; and I have never been able to understand why in a matter of great public concern such as this, Judge MAYER set himself against it. It was clearly understood that conditions were certain to develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge MAYER refused to grant any of the relief sought by the City. He not only denied the relief, but he made orders which preclude any application being made by the Municipal authorities to any other Court or Judge for any right of examination into the affairs or conditions of these corporations seeking Municipal aid and favor.

Truth is the mightiest weapon in every controversy. The orders of Judge MAYER deny to the Municipal authorities the opportunity to ascertain the truth.

The franchises and rights enjoyed by these corporations were mostly all procured many years ago when corrupt political rings were in control of public affairs and the darkest scandals of Municipal history, both in the old City of New York and in the City of Brooklyn, prior to consolidation, are those in relation to such grants. The affairs of the franchise holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interests. They will open and open wide without any reservations or restrictions before

there will be any conference so far as I am concerned.

It seems to me a monstrous thing that an order of a Federal Judge in a Court of Equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of The City of New York in these controversies. Its operation and effect is to disarm the Municipal authorities, to deny them the most effective instrument of redress, and to force them into a contest with corporate powers entrenched in darkness and concealment.

The responsibility for the turmoil, delay and dissatisfaction that has followed upon the orders of Judge MAYER, denying to The City of New York any representation in these receiverships, rests upon those who procure and are protected by such orders.

As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications, should procure the entry of orders by Judge MAYER putting The City of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

Yours very truly,

CHARLES L. CRAIG,
Comptroller."

This letter was signed by the petitioner "who was then Comptroller and chief financial officer and a member of the Board of Estimate and Apportionment of the City of New York" (Record, fols. 1719-1724; pp. 573-574, in his official capacity as Comptroller (Record, fols. 154-156, 167; pp. 52, 56) and was in response to the invitation of Public Service Commissioner Nixon, who had called a conference for the purpose of discussing the financial

and physical condition of the traction lines in the City of New York, including those involved in the suits and proceedings pending in the District Court and considering any suggestions that might be made by the conferees with respect to the future of the said lines and the relations between them and the City of New York (Record, fols. 205-209; pp. 69-70). It was further alleged that the petitioner "did cause the said letter to be delivered to the said Public Service Commissioner and to the persons attending the said conference at the said office of said Public Service Commissioner" (Record, fols. 167-168; p. 56). The letter was physically delivered into Commissioner Nixon's hand while the conference was actually being held, as he sat upon the dais in the Public Service Commission Room. Some time before the letter was received he had asked the press who were not representatives of companies to withdraw. He opened the envelope, glanced through the letter and then read it aloud. (Record, fols. 392, 393; 397-399; pp. 131-133). At that time the Comptroller was in fact engaged in the performance of imperative public duties (Record, fols. 1791-1797; pp. 597-599)—as appears on the face of the letter itself and as was testified to by the Comptroller (Record, fols. 1812-1814).

It was still further alleged in the Information that the petitioner "did cause the same letter to be published in various newspapers" (Record, fol. 168; p. 56), but, as to the latter, it was shown that the letter reached the public press through a usual routine of giving out letters for publication which prevailed in the Comptroller's office.

The writing was an isolated act as appears by the Information, and no matter of aggravation was alleged.

The circumstances under which the letter was

written, and the proceedings instituted, were as follows:

The Public Service Commissioner had addressed a formal communication to the Comptroller requesting him to attend a conference. That letter is set forth at fols. 2191-2198 of the Record, Governments Exhibit No. 1. Commissioner Nixon had written an additional letter to the petitioner on the subject (Record, fols. 1779-1780; p. 593).

Prior to the calling of the conference on application being made for the appointment of a Receiver or Receivers of the Railway Company's properties, the petitioner in his capacity as Comptroller had made application, at the express direction of the Board of Estimate and Apportionment of the City of New York, for the appointment of himself as a co-receiver, to serve without compensation (Record, fols. 1761-1764; 3150-3155; pp. 587-588; 1050-1052) so that he might have access to original sources of information and protect the interests of the City in the operation of the railways. The City had vast interests in the railway properties in many ways (Records, fols. 1729-1744; pp. 576-582) as was recognized by Judge MAYER himself (Record, fols. 1747-1749; p. 583).

Judge MAYER, however, declined to appoint the Comptroller as co-receiver, holding that there was no need or occasion, at that time at least, for the appointment of a co-receiver, but without prejudice to renewal of the application (Record, fols. 3216-3218; pp. 1072-1073) which, however, was never renewed, and the receiver was made permanent on January 22, 1919 (Record, fols. 3202-3219; pp. 1068-1073).

During the course of the receivership Judge MAYER directed that information be furnished to the officials of the City of New York, but the Comptroller did not know that the corporation counsel

was being served with notice of the proceedings nor discuss them with him (Record, fols. 1766-1767; p. 589).

The counsel who had formerly been counsel for the Railway Companies was retained by the Receivers appointed by Judge MAYER (Record, fol. 1839; p. 613), and the personnel had not changed so that so far as original sources of information were concerned, affairs were in exactly the same position as they were before the receivers were appointed (Record, fols. 1841-3; pp. 614-615). One of the persons connected with a traction company had on a public occasion endeavored to prevent and announced his intention to prevent access to original sources of information (fols. 1843-1844; p. 615). Information had come to the Comptroller with respect to transactions of the several companies "which no human being would ever suppose for a minute would be voluntarily disclosed by anyone identified with the Company" (Record, fols. 1845-1846; pp. 615-616), and he knew when he wrote the letter that information had actually been withheld even under public pressure, and even when the person had been subjected to an oath, and that information had been falsified by the persons in possession of the records, at a time anterior to the receiverships. He also knew that in other instances the books of these very railroad companies had been sold in great quantities to junk men for the purpose of reducing them to pulp and that they had been reduced to pulp and the rights of the litigants adversely affected by the destruction of the books (Record, fols. 1846-1847; pp. 616). Judge MAYER himself characterized the latter incident as "a matter of almost common knowledge" (Record, fols. 1848-9; pp. 616-617). That was prior to the appointment of these receivers.

Much dissatisfaction and turmoil arose in the

operation of the railways and many propositions were put forward by and under the direction of the Court and by and under the direction of the public authorities in an attempt to solve the great difficulties that arose (Record, fols. 1729-1769; pp. 577-590). To state the matter briefly, the policies of Judge MAYER and that of the public officials were in direct antagonism as an examination of the record will disclose (fols. 3022-3096; pp. 1008-1032).

In that situation Public Service Commissioner Nixon called the conference, which has been alluded to.

The Court had not suggested the conference, but when Commissioner Nixon had suggested it, the counsel for the receivers had conferred with the Court and asked him (Judge MAYER) whether they should attend it and carry out some important suggestions (Records, fols. 1112-1113; pp. 371-372) and they did attend for that purpose (Record, fols. 1112-1116; pp. 371-372).

At the time that the letter was read at the conference, one of the counsel for the receivers asked for a copy of the letter, stating that the letter was in many respects false (Record, fols. 1114-1116; p. 372). A copy was made, and he took it and showed it to Judge MAYER (Record, fols. 1082-1084; 1100-1102; pp. 361, 367-368) and took a verbal message or direction from Judge MAYER to Col. Caffey, the District Attorney, to institute a contempt proceeding (fols. 1174-1176; pp. 391-392). It is not clear, and was not made clear, whether at the time the proceedings were directed to be instituted the letter had been published in the newspapers (Record, p. 376; fol. 1127). The letter was not given out for publication by the Comptroller, who testified that he had no intention that it should be published, and that publicity defeated the very purpose that he had in mind

when he wrote the letter (Record, fols. 1821-1822; 1988-1994; pp. 607-608; 663-665), but after it had been read at the conference the newspaper men communicated with the Secretary of the Finance Department and asked for a copy of the letter which they had heard was read at the conference, and in ordinary and regular routine the Secretary of the Finance Department, who is an appointee of and paid by the City of New York, gave the letter out for publication (fols. 612; 651-653; pp. 204; 217-218) without any direction of the Comptroller nor with his knowledge (Record, fols. 1978-1981; pp. 660-661).

An order was made by District Judge MAYER requiring the petitioner to show cause why he should not be declared in contempt of the District Court. The petitioner appeared, involuntarily, and challenged the jurisdiction of the Court in every stage of the proceeding (Record, fols. 211-213; 223-240; pp. 71; 75-80). The petitioner, successively, demurred and later pleaded Not Guilty and asked that another Judge of the District Court be designated to hear the proceedings, but his request was overruled by Judge MAYER (Record, fols. 244; 264, 1596; pp. 82-88; 532) who assumed to try the petitioner.

On the hearing the petitioner was a witness in his own behalf. He gave testimony as to his intention and purpose in writing the letter. Commissioner Nixon's letter fixing the time for the proposed conference came to him on the morning of October 6th (the date of his letter) and was one of the many things he had to attend to on that morning. His letter in reply was written in considerable haste. The writer's purpose was to "Get into the mind of Nixon the necessity for that kind of co-operation resulting in the public authorities being on an equal footing with those representing

the traction interests" (Record, fols. 1802-1805; p. 601).

The petitioner testified that he did not expect the Commissioner to read the letter at the conference; "the last thing on earth that had ever entered my head was that Mr. Nixon would be so foolish as to read that letter to the railroad attorneys that he had to negotiate with" (Record, fol. 1818; p. 606).

The petitioner further testified as to what he intended by the language employed in the letter; that what he meant by "original sources" was "all of those books, documents, records and memoranda in the possession of the various companies and in their archives that shed light upon the property and affairs of the companies in whatever manner, shape or form those may be kept" (Record, fols. 1832-1833; p. 611), and that he meant by "denying access" to original sources, the inability to have full and unrestricted access with power to compel any subordinate to produce or dig up whatever it might be or be suspected of being, all of the facts that relate to these different companies; that anything that cut us short of that was a denial of access to the original sources; and that the very purpose of the application that had been made to the United States District Court for the appointment of a co-receiver was to have some one who was in a position to bring about these disclosures, and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources (Record, fols. 1832-1835; pp. 611-612). The petitioner further testified as to how and in what respects it was important to the financial interest of the City of New York, and to its citizens, to have its officials well informed of the matters pertaining to the railroad companies' affairs and that the most favorable and practicable way to this end

was that a co-receiver be appointed, who, in some way, would be representative of the City. The petitioner denied upon oath that he intended to convey the meaning that the District Judge had in point of fact denied access to original papers, except in so far as such denial might flow from his refusal to appoint him co-receiver (Record, fols. 1833-1835; p. 612). The application for the appointment of the Comptroller, as co-receiver, had been denied on the 22nd day of January, 1919, and the receiver had been made permanent.

At the time that the letter was written, October 6, 1919—which was nine months after the Court's denial of the motion for the appointment of the Comptroller as co-receiver—there was not pending *sub judice* in the District Court, before Judge MAYER or any other Judge, awaiting decision, any judicial determination. The subject matter of the petitioner's letter had long before been disposed of, as we have seen (Record, fols. 2526-2528; 3202-3219; pp. 842-843, 1068-1073).

Judge MAYER proceeded, after hearing testimony, to declare the petitioner in contempt of said Court *as charged* in said Information *in respect of* the matters set forth in paragraphs 1, 2, 3 and 4 of said Information (Record, fols. 2512-2516; pp. 838-839).

The paragraphs of the Information referred to are to be found in fols. 168-174 of the Record, all of which, upon their face, relate wholly to the criticism of long past judicial acts. Judge MAYER signed an order of commitment directing that the prisoner be imprisoned for a term of sixty days, sentence to be executed at the Essex County Jail, Newark, New Jersey, and thereupon the Marshal took the petitioner into custody (Record, fols. 109-111; p. 37).

The petitioner presented to Circuit Judge MANTON a petition for a writ of habeas corpus, while

in the custody of the Marshal. At that time Judge MANTON was acting under a designation, pursuant to Section 18 of the Judicial Code, appointing him to hold a session of the District Court for the trial of causes and for the hearing and disposing of such *ex parte and other business as might come before him*. Judge MANTON was the only Judge attending at that time to the Chambers business of the District Court (Record, fols. 2604; 2648-2658; pp. 868; 883-886). The petition was presented at *Chambers*, the District Court not being then in session (Record, fols. 2649-2658; pp. 2662-2666; pp. 883-889).

The petition for a writ of habeas corpus set forth among other things:

> "a. That neither on the 6th nor 7th day of October, 1919, was there pending *sub judice* before said District Judge or said Court any matter or judicial determination in any suit or proceeding mentioned in the Information or in any suit or proceeding consolidated with any or either of such suits and proceedings."
>
> "b. That all orders and judicial determinations which were referred to in the letter of October 6, 1919, from your petitioner to Louis Nixon, Public Service Commissioner, set forth in the said Information had been previously made and concluded and that no hearing was pending, awaiting determination, upon any of said orders or judicial determinations or the subject matter thereof (Record, fols. 112-113; p. 38).

The petitioner averred, among other things,

> "n. That neither the Court nor Judge acquired jurisdiction of the person of the defendant.
>
> "o. That neither the Court nor Judge had jurisdiction of the subject matter set out in the Information.
>
> "p. That the District Judge exceeded his jurisdiction in making the orders, judgment,

decree, and commitment made in the proceeding upon said information and each of them.

"q. That the said court and the said district judge acted in excess of its and his powers in finding your petitioner guilty of contempt (fols. 120-121; pp. 40-41)."

"19. Your petitioner further alleges that said order and commitment were and are void and were made without any jurisdiction in the court or the said judge to make, file or enter the same and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and without due process of law and, since being taken into custody by said Marshal, as aforesaid, has been continuously so deprived of his liberty, in violation of the Constitution of the United States, and especially the Fifth Article of the amendments thereof and in violation of the laws of the United States" (Record, fol. 126; p. 42).

Circuit Judge MANTON granted the petition and issued the writ of habeas corpus.

The Return to the Writ explicitly set forth that:

"On October 6, 1919, there was not pending, awaiting decision, any order or judicial determination mentioned in the letter of that date from the petitioner to Louis Nixon set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change." (Record, fols. 2526-2528; pp. 842-843).

Upon the Petition, Return, Denial and Traverse (all of which appear in the Record [fols. 97, 2521-2554]), Circuit Judge MANTON, at Chambers, did "proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require," as provided in the Habeas Corpus Act, R. S. Sec. 761. Thereupon the said Circuit Judge rendered his opinion and decision (*Ex parte*

Craig, 274 Fed. 177), holding that the District Court had exceeded its jurisdiction by an excess of power assuming to adjudge the petitioner guilty and made an order discharging the petitioner and directing that papers in the habeas corpus proceeding be *filed* with the Clerk of the District Court and that the order be *recorded* in said court (Record, fols. 16, 94, 95; pp. 6, 32), thus adopting and following the precise form and procedure of a Judge's order, such as was under consideration by this Court in *Carper* v. *Fitzgerald*, 121 U. S., 87.

After the petitioner's discharge in the habeas corpus proceeding, the Marshal presented to one of the Circuit Judges, assignments of error, together with a petition, and thereupon said Circuit Judge allowed an appeal from the order of discharge in the habeas corpus proceedings to the Circuit Court of Appeals for the Second Circuit and issued a citation (Record, fols. 1-15; pp. 1-5).

Petitioner thereupon applied to the Circuit Court of Appeals, on notice to the Marshal, to vacate and set aside the citation and order allowing the appeal and to dismiss the appeal, upon the ground that the Circuit Court of Appeals had not jurisdiction or power to entertain and decide the appeal, for the jurisdictional reasons set forth in said motion, which was thereafter denied.

After a hearing of the appeal in the Circuit Court of Appeals, that Court (ROGERS and HOUGH, *C. J.*, concurring, LEARNED HAND, D. J., dissenting) reversed the order sustaining the writ of habeas corpus and remanded the petitioner to the custody of the Marshal (Record, fols. 3391-3522; 3586-3591; pp. 1131-1174; 1196-1197). The opinions are reported 282 Fed., 138. Thereupon an application was made to this Court for a writ of certiorari which was granted.

The Petitioner's Grounds for Review

The petitioner asks the intervention of this Court on the following grounds, upon which the writ of certiorari was asked for:

I. He was not punishable by imprisonment, as for a contempt of court, for the reason that there was no misbehavior tending to obstruct the administration of justice; and the District Court acted in excess of its jurisdiction in sentencing him to imprisonment.

II. Petitioner's discharge by Circuit Judge MANTON in habeas corpus proceedings was proper.

III. The Circuit Court of Appeals was without jurisdiction to review the order of discharge made by Circuit Judge MANTON.

POINT I

This case and the questions therein are of public interest and great importance.

The urgent questions that are presented for decision by this Court are:

1. The Circuit Court of Appeals has held that a Circuit Judge has no jurisdictional authority to issue a writ of habeas corpus, notwithstanding its unbroken exercise since the creation of the office of Circuit Judge, and notwithstanding that there has been no express amendment of the Habeas Corpus Act in that respect.

The question involves the jurisdictional authority of thirty-four Circuit Judges and the newly created Circuit Judges, throughout the United States. The present decision confines the issuance of such writs, in practical effect, to the District Courts and the District Judges. This is discussed under Points III and IV, *infra*.

2. In entertaining jurisdiction of the appeal from the order of Circuit Judge MANTON, there was (a) a disregard of the uniform decisions of this Court that no appeal lies from an order of a Judge (b) a direct conflict of decision, upon the appealability of a Judge's order, with the Circuit Court of Appeals for the Fifth Circuit, which has held that a Circuit Court of Appeals had no appellate jurisdiction to review such an order (*Hoskins* v. *Funk*, 239 Fed. 278). In the interest of uniformity of decision this Court should interpose to settle the conflict. This is discussed under Point V, *infra*.

3. The main question is whether the District Court, possessing only limited powers to punish for contempt, acted in excess of its jurisdiction in assuming to punish the petitioner for contempt in writing a letter, nine months after the action of the Court which it criticized, when in his act there was no possibility of the "obstruction" of justice. This is discussed under Point II, *infra*.

4. The petitioner is confronted daily, in the discharge of his official duties as chief financial officer of the City of New York, with the possibility of an incarceration in the State of New Jersey, beyond the confines of his sphere of office, that would render him *functus officio* for sixty days.

5. The petitioner is prevented from freely exercising his office in safeguarding the financial interests of the City with regard to the traction properties, which are still under control of the Court, lest by word or act of a like or similar kind he be again put in jeopardy of imprisonment.

6. The petitioner is a member of the Charter Revision Commission, which is considering municipal ownership and operation, and this calls for comment on the presently existing judicial control, through receivers of such public utilities, and he is embarrassed and circumscribed in the performance

of his duties, lest legitimate and necessary criticism on such judicial control and operation be regarded as contemptuous, while Circuit Judge MAYER, under designation, is continuing in the management and control of such railways through receivers appointed by him when District Judge.

7. The appropriateness of the remedy, by Habeas Corpus, is discussed under Point VIII, *infra*.

This case presents "all the unfortunate possibilities of conflict and collision which might arise" from a further exercise by a municipal officer of the duties of his office in a situation where the municipality has vast financial interests in local transit properties which are, nevertheless, under the control of a Federal Court. A clash of words has been construed and punished as though it were a clash in acts, and, unless this Court reaches out and defines the legitimate scope of criticism, the municipal officer will not only be imprisoned, but will continue to be repressed in the free exercise of his duties after the term of imprisonment.

We feel that it may be fairly said that the honest expression by an official of his views on a public question within the sphere of his duties is as essentially an official act (*Spalding* v. *Vilas*, 161 U. S., 483) as would be an official order, and that the repression of the one, by the likelihood of recurrent punishment, is a continuing interference with the other.

Doubtless, because of the seriousness and importance of the questions involved, the Circuit Court of Appeals in its opinion said:

> "If this Court is in error in the conclusion at which the majority of the Court has arrived, it is by no means impossible that the Supreme Court can correct any mistake we may have made" (Record, page 1158, fol. 3473).

POINT II

The District Court acted in excess of its powers and beyond its jurisdiction, under the limited powers of a federal court, to punish for contempt, because the act for which petitioner was held guilty was not "misbehavior," and did not "obstruct," nor could it possibly have obstructed the administration of justice.

The letter was written nine months after the action of the Court which it criticized (Record, fols. 2199 and 3219) and nowhere in the information, evidence or commitment does it appear what future decision could possibly be influenced.

It did not relate to any pending or imminent *judicial* act. It related only to a possible *conference* of State and Municipal officials with the representatives of the railways. There was no intimidation, no threat and no consequence intimated except a failure of the proposed conference. If there was any obstruction it was of the conference, not of the Court.

The proceeding against the petitioner was brought under the Judicial Code, Section 268, the pertinent provision of which is as follows:

> "The said courts (United States Courts) shall have power * * * to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority: *Provided,* That such power to punish contempts shall not be construed to extend to any cases except the *misbehavior* of any person in their presence, or so near thereto as to *obstruct* the administration of justice. * * *" (Italics ours.)

The Court, while a Superior Court, when acting

under this Statute is exercising a sharply limited jurisdiction, which may always be inquired into.

Under this provision there must exist (a) "misbehavior" and (b) an act "to obstruct the administration of justice."

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is the characteristic upon which the power to punish for contempt must rest."

Ex parte Hudgings, 249 U. S., 378, 383;

See also:

Toledo Newspaper Co. v. *United States,* 247 U. S., 402, where the same thought was expressed in these words, at page 419:

> "The test, therefore, is the character of the act done, and its direct tendency to prevent and obstruct the discharge of judicial duty * * *"

> "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." Bac. Abr. Hab. Corp. B. 10.

> "Though the Court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot transcend the power conferred by the law."

Windsor v. *McVeigh,* 93 U. S. 274, 282.

By the 17th section of the Judiciary Act of 1789 the Courts of the United States had power to punish "all contempts of authority in any cause or hearing before the same."

The Act of March 23, 1831, was entitled "An

Act declaratory of the law concerning contempts of Court;" it later became Sec. 725 of the Revised Statutes and is now sec. 268 of the Judicial Code.

The Act of 1831 followed the acquittal of District Judge PECK, who was impeached for imprisoning an attorney for a criticism of one of his decisions, after the case had ended in his court.

We shall proceed to discuss

A. "*Misbehavior.*" The word in the Act of 1831 (which has been re-enacted without change as Section 268 of the Judicial Code), and upon which the entire jurisdiction of the Court depends, is "*Misbehavior.*" The word "misbehavior," as conferring summary jurisdiction, is out of joint, sense or rational connection, utterly so, with any official act on the part of a public officer like the Comptroller of the City of New York, who, mistakenly or otherwise, is pursuing a course that relates to the subject-matter of his office and duties within his sphere of office. In other words, misbehavior, however broadly construed, does not mean the wrong or wrongful exercise, or attempted exercise, of functions within the jurisdiction of the officer charged. Such acts are privileged (*Spalding* v. *Vilas,* 161 U. S., 483; *DeArnaud* v. *Ainsworth,* 24 App. D. C., 167; 5 L. R. A. (N. S.), 163; *Farr* v. *Valentine,* 38 App. D. C., 413; *Chatterton* v *.Secretary of State for India,* 2 Q B. (1895) 189; *Dawkins* v. *Paulet,* L. R., 5 Q. B. 94; *Beatson* v. *Skene,* 5 Hurl & Nor., (Excheq.) 838. It should be recalled that the letter was alleged in the Information to have been "in response to the invitation" (Record, page 52, fol. 155) of one official to another, and was in fact such (*id.,* pp. 731-736; fols. 2191-2211), and that when Mr. Nixon had suggested the conference, counsel for the receiver had conferred with Judge MAYER and asked him whether they should attend it and carry out some important suggestions (Record, fols.

1112-1113, p. 371). The statute does not mean that he shall be punished by imprisonment for transcending the bounds of official etiquette by the use of intemperate words in a letter. In other words, "*misbehavior*" as used in the statute means the physical or oral act of some person who is misbehaving in the ordinary sense of the word.

In *Miner* v. *Detroit Post & Tribune Co.*, 49 Mich., 358, Judge COOLEY, writing for the Court, pointed out the difference in moral quality between the publication of mere personal abuse and the discussion of matters of grave public concern.

That was an action for libel, it is true, but we cite it because of the eminence of the Judge who wrote in that case defining a principle of general application. The case itself touched a judicial act of an inferior Judge—the newspaper accused a magistrate of committing a Chinaman, without a charge made against him and without evidence and holding him under heavy bail, and yet it was held privileged, in the absence of malice.

In *Gathercole* v. *Miall*, 15 M. & W., 319, 332, which was an action for libel by the vicar of a parish against the publishers of "The Non-Conformist" which commented "with much freedom and severity" on his sermons, conduct and management, POLLOCK, C. B., said:

> "I think it quite right that all matters that are entirely of a public nature;—conduct of ministers, conduct of Judges—the proceedings of all persons who are responsible to the public at large, are deemed to be public property; and that all bona fide and honest remarks upon *such* persons, and their conduct, may be made with perfect freedom, and without being questioned too nicely for either truth or justice."

(We have quoted only a portion of a long paragraph, so as not to distract attention from

the point under discussion, but are quite sure that we have done the context no violence.)

In *Wason* v. *Walter*, L. R. 4 Q. B. 73, COCKBURN, *C. J.*, said at page 93:

> "The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?"

In *McLeod* v. *St. Aubyn*, (1899) A. C. 549, 561, 81 L. T. R., 158, 161, before the Judicial Committee of the Privy Council Lord MORRIS speaking of a newspaper attack on the acting Chief Justice of St. Vincent, said:

> "Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

It is true that in the Toledo Newspaper Company case, *Toledo Newspaper Co.* v. *U. S.*, 247 U. S., 402, the Court punished the defendants for newspaper publications, but only upon the ground that they actually tend to obstruct justice, in a matter then *sub judice*. That was an extreme case where the newspapers' continuous and protracted

attacks well nigh stopped the wheels of justice, inciting the public to defy the Court while deliberating over the cause before it. It marks the point at which the Court will stop, since the trend of public thought, which has found expression as a development of the law, is against punishment for contempt, in a summary way, arising out of public utterances. Nor will it do to say that the Court will punish as for a contempt what is usually termed an abuse of freedom of expression, sometimes termed license, for there are other ways of punishing license, as by an indictment of a grand jury and criminal trial or by civil suit for libel—remedies that are usually overlooked in a discussion of the subject. But we need not go to those lengths here, for neither the letter itself, rightly understood, as we contend, nor the meaning of it as given by the petitioner under oath, shows the slightest disrespect for the Court, much less "scandalising the Court" or a desire to "obstruct."

Had there been added to the words of the letter, which reads as follows:

> "• • • denying to myself and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of these various public-utility corporations holding franchises to operate in the streets of New York"

these words:

> *by refusing to appoint the nominee of the Board as co-receiver,*

there would have been no possibility of misconstruction, and yet that is exactly what the context of the letter shows that he meant, and what the Comptroller, himself, testified that he meant.

We have refrained from repeating under this point, the luminous testimony of the Comptroller

giving his own meaning of the several paragraphs of the letter (pages 599-604, fols. 1797-1812; page 611, fol. 1832; page 612, fol. 1835; pages 665-668, fols. 1995-2002; pages 669-670, fols. 2006-2010; pages 691-693, fols. 2073-2077), which is wholly consistent with the wording of the letter and is the natural meaning that would be ascribed to it by an ordinary reader without straining any part of it from its context.

In so ordinary a book as the smallest edition of Webster's Dictionary the word "denial" has the significance of "non-compliance," which is the sense that the context shows that the Comptroller used the words "denying to myself and other members * * * any access to original sources of information," in connection with the refusal of the Court to grant the application for a co-receiver.

We cannot do better, we believe, than to quote from a high authority on the use of our language, as follows:

> "In this particular instance the issue between Judge Mayer and Comptroller Craig *is really one of terminology or of interpretation.* The Judge had refused to make Mr. Craig a co-receiver of the B. R. T. The Comptroller regarded that as denying the city access to first-hand information about the B. R. T. conditions. He so characterized it. Whether the characterization was accurate or not is one of the points yet to be determined." (Editorial in *Brooklyn Daily Eagle*, February 25, 1921.)

The right of free criticism of judicial acts has been recognized by high authority, which seems clearly to remove it from the realm of "Misbehavior." President Roosevelt, in his message to Congress, in December, 1906, said:

> "The judge has a power over which no review can be exercised; he himself sits in review

upon the acts of both the executive and legislative branches of the Government; save in the most extraordinary cases he is amenable only at the bar of public opinion; and it is unwise to maintain that public opinion in reference to a man with such power shall neither be expressed nor led.

"The best judges have ever been foremost to disclaim any immunity from criticism. This has been true since the days of the great English Lord Chancellor Parker, who said: 'Let all people be at liberty to know what I found my judgment upon; that, so when I have given it in any cause, others may be at liberty to judge of *me*.' The proprieties of the case were set forth with singular clearness and good temper by Judge W. H. Taft, when a United States Circuit Judge, eleven years ago, in 1895:

'The opportunity freely and publicly to criticize judicial action is of vastly more importance to the body politic than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny and candid criticism of their fellow-men. Such criticism is beneficial in proportion as it is fair, dispassionate, discriminating, and based on a knowledge of sound legal principles. The comments made by learned text writers and by the acute editors of the various law reviews upon judicial decisions are therefore highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits, and thus exert a strong influence to secure uniformity of decision. But non-professional criticism also is by no means without its uses, even if accompanied, as it often is, by a direct attack upon the judicial fairness and motives of the occupants of the bench; for if the law is but the essence of common-sense, the protest of many average men may evidence a defect in a judi-

cial conclusion, though based on the nicest legal reasoning and profoundest learning. The two important elements of moral character in a judge are an earnest desire to reach a just conclusion and courage to enforce it. In so far as fear of public comment does not affect the courage of a judge, but only spurs him on to search his conscience and to reach the result which approves itself to his inmost heart, such comment serves a useful purpose. There are few men, whether they are judges for life or for a shorter term, who do not prefer to earn and hold the respect of all, and who can not be reached and made to pause and deliberate by hostile public criticism. In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.

'On the other hand, the danger of destroying the proper influence of judicial decisions by creating unfounded prejudices against the courts justifies and requires that unjust attacks shall be met and answered. Courts must ultimately rest their defence upon the inherent strength of the opinions they deliver as the ground for their conclusions and must trust to the calm and deliberate judgment of all the people as their best vindication.'

"There is one consideration which should be taken into account by the good people who carry a sound proposition to an excess in objecting to any criticism of a judge's decision. The instinct of the American people as a whole is sound in this matter. They will not subscribe to the doctrine that any public servant is to be above all criticism. If the best citizens, those most competent to express their judgment in such matters, and above all those belonging to the great and honorable profession of the bar so profoundly influential in American life, take the position that there

shall be no criticism of a judge under any circumstances, their view will not be accepted by the American people as a whole. In such event the people will turn to and tend to accept as justifiable, the intemperate and improper criticism uttered by unworthy agitators. Surely it is a misfortune to leave to such critics a function, right in itself, which they are certain to abuse. Just and temperate criticism, when necessary, is a safeguard against the acceptance by the people as a whole of that intemperate antagonism toward the judiciary which must be combated by every right-thinking man, and which, if it became widespread among the people at large, would constitute a dire menace to the Republic."

Congressional Record, Fifty-ninth Congress, Second Session, pages 23-24.

A construction that prevents the free criticism of an act of the Court performed in one year or another during the course of years that the receivership might run and until the subject matter had ceased to be of any public interest would be a moratorium on public comment.

B. There was no *"obstruction,"* because there was "No Pending Judicial Determination," and none was imminent. Even though the Court be of opinion that the letter of October 6, 1919, was not absolutely privileged, as we contend it was, we submit that under the cases cited, *supra,* the letter did not tend to affect the administration of justice, in that it could not possibly influence any decision, for none was pending or imminent. The orders, policy and refusal had been made and taken nine months prior to the letter and were so far in the background that even an unprivileged, hostile communication thereon could not impinge on the statute, Sec. 268 of the Judicial Code, so as to give the Court jurisdiction to entertain contempt proceedings against the author on the ground that the act was misbehavior which tended to "obstruct the administration of justice." The Court's action was complete in respect of the matters which had occupied its deliberations and, being complete, the criticism of it followed lawfully.

No act of obstruction was specified or defined in the Information or found by the conviction.

The Information set forth four respects in which it was alleged that the letter was *false,* numbered definitely 1, 2, 3 and 4.

The conviction was for "contempt of this Court *in respect of* the matters set forth in paragraphs 1, 2, 3 and 4 of the Information" (Record, fols. 2512-2516, pp. 838-839), all of which related to criticism of acts wholly past (vide Information, Record, fols. 168-174, pp. 56-58).

An inspection of the original order of Judge MAYER on file in the District Court (filed on the 23d day of February, 1921) will show that Judge MAYER wrote into the order by his own hand the words: "in respect of the matters set forth in" preceding the typewritten words: "paragraphs num-

bered 1, 2, 3 and 4 of the information herein," thus showing that he deliberately intended to confine the alleged contempt to the criticism of past acts which, alone, are set forth in the paragraphs of the Information thus specified.

We submit that the legal meaning of the conviction is that the petitioner was guilty of making four false statements respecting acts of the Court, long past, nothing more. "In respect of" means in common parlance "for" or "only for."

The general conclusion that he was guilty of contempt of court, in respect of those acts, added nothing to the alleged offense, which was simply that he had written falsely of the Court's past acts. No connection is disclosed between the alleged falsehoods and any matter then pending or imminent.

It is impossible to find any connection between the falsehoods as to the past and any present or future act of the Court, or any discernible obstruction or tendency to obstruct.

There was no adjudication embracing that portion of the letter referring to a "reversal of policy," for the reasons, no doubt, set forth at fols. 2006-2018, 2078, 2079.

The judgment does not furnish legal basis for the sentence, because it defines, and thereby limits its operation to past acts without the scope of the statute.

> "The question then arises, *whether the facts recited in the final order in the District Court as constituting the contempt*—which facts must be taken in this collateral proceeding to be true—*make a case of misbehavior* in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice therein" (italics ours).
>
> *Savin, Petitioner,* 131 U. S. 267, 276.

In the case at bar the facts recited in the final

order, limited solely to past acts, do not make a case of obstructive misbehavior.

The judgment shows upon its face affirmatively that no judicial duty was in process.

As the alleged contemptuous acts were expressly limited by the form of the judgment, no presumption of the existence of other facts in support of the jurisdiction will be indulged.

In *Galpin* v. *Page*, 18 Wallace (85 U. S.), 350, Mr. Justice FIELD, delivering the opinion of the Court, said at page 366:

> "But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the

averment, the necessary facts to support the judgment are presumed."

The Comptroller was held guilty of telling falsehoods out of Court. In the *Hudgings* case, *supra*, the defendant was found guilty of telling falsehoods in Court. In each instance the falsehoods lacked an obstructive characteristic.

The obstructive effect must really exist. "The *presence* of that element must *clearly be shown* in every case where the power to punish for contempt is exerted," as was said in the *Hudgings* case, *supra*.

Application had been made under express direction of the Board of Estimate and Apportionment for the appointment of a co-receiver in behalf of the City of New York in the railway controversy. That application had been denied and disposed of on the 22d day of January, 1919 (Record, page 1073, fol. 3219), long before the letter of October 6, 1919, was written. The Court had intimated that it might be renewed (Record, page 47, fols. 139-141), but it had not been renewed, and the receivership had been made permanent (Record, pages 1068-1072).

It is not claimed that any determination was pending or imminent.

The return to the writ of habeas corpus has settled this for all time. From paragraph Fourth of the Return, we quote (fols. 2526-2527):

> "On October 6, 1919, *there was not pending awaiting decision any order or judicial determination* mentioned in the letter of that date from the petitioner to Lewis Nixon set forth in the Information, but the same was *still within the control* of the District Court of the United States for the Southern District of New York *and subject to change.*"

We submit that, if it were possible under the system of pleading in a habeas corpus proceeding,

the petitioner might have been discharged upon that admission in the return, standing alone.

The majority judges of the Court below, however, did not in either opinion refer to this important concession.

Of course, the whole railroad situation was before Judge MAYER, but it was before him wholly in an administrative capacity; "there was not pending awaiting decision any order or judicial determination" in the language of the return.

We emphasize that it was only within the control of the Court and subject to change *if* the Court *were moved thereto* by some person. We know of no ambulatory jurisdiction of a Court that would allow the Court to change its decisions or orders without being moved thereto by a party in interest.

The Court below did not in either opinion place any importance on the assertion in the Return that the matter was still within the control of the Court and subject to change, but it may be well to look at what another Court has regarded as pending.

As to what constitutes a subject-matter pending *sub judice*, was considered in *Metzler* v. *Gounod*, 30 L. T. R. N. S. 264, Court of Common Pleas, before KEATING, BRETT and DENMAN, *JJ.* There was a motion for a rule to show cause why an attachment should not issue against Mrs. Georgina Weldon for contempt of Court for circulating at a concert printed statements which were said to give a grossly unfair statement of the facts at a trial "at variance with those which had been sworn to." The trial had taken place, but the defendant had leave to move for a non-suit or new trial on technical grounds. It appears by the report of the case that during the argument Judge KEATING asked the following suggestive question:

> "Is not this contingent contempt? There was no trial pending."

In delivering the opinion of the Court, KEATING, *J.*, said:

> "I think there is no ground whatever for this application. It is, of course, most desirable and necessary that nothing should be done to prevent a fair trial being had when parties are once before the Court and the decision of the disputed question is still pending. The Court should be protected against any bias being created by proceedings outside, which might prejudice the litigants who are availing themselves of its process. But there is nothing of the sort here. The trial had taken place and the plaintiff had obtained a verdict and the defendant had leave to move for a non-suit or a new trial on technical grounds. The motion may or may not be made; the time has not expired; but it does not matter whether it is made or not, nothing is now pending before the Court," etc.

We know of no right in a Court to have its decree and orders subject to change without being moved thereto by a party, and such a move by a party is what the Comptroller intended to accomplish by his letter. He intended to move *the parties thereto* to bring about some change. This cannot be made too clear. He intended to make no impression upon Judge MAYER.

He testified that that was his position (Record, fols. 1818-1824); and that the disclosure of the letter, before the newspaper men got hold of it, was furthest from his mind. Quoting his testimony on this point, we find:

> "The last thing on earth that had ever entered my head was that Mr. Nixon would be so foolish as to read that letter to the railroad attorneys that he had to negotiate with" (Record, fol. 1818).

Regardless of his testimony, the letter shows upon its face that his intention was that "As a first and

preliminary evidence of good faith, *those who desire* such a conference and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting the City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That shows distinctly that the impression he intended to make was upon the representatives of the railways, through Mr. NIXON, if the latter were to agree with him.

In the case of *Patterson* v. *Colorado,* 205 U. S., 454, Mr. Justice HOLMES, in delivering the opinion of the Court, said at page 463:

> "When a case is finished, the courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

The import of the statute is defined in the statement of its purpose in the opinion of Chief Justice WHITE in the *Toledo* case, 247 U. S., pp. 402, 419, where he said:

> "The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted by necessary implication, recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts *tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power* given by summarily treating such acts as a contempt and punishing accordingly. *The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty—a conclusion which necessarily sustains the view of the statute taken by the courts below* * * *." (Italics ours.)

The view taken by the lower courts in the *Toledo* case may be summarized as follows:

In *Toledo Newspaper Co.* v. *United States*, 237 Fed. Rep., 986, 990 (C. C. A.), Judge DENISON said:

> "Upon this record, the publications had reference to *pending judicial action*, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, *if one should be made*, and there is a finding that they constituted an attempt to intimidate—*at least unduly to influence*—the District Judge *with reference to his decision in the matter pending before him.*" (Italics ours.)

The above quotation from the opinion of Judge DENISON is cited with approval in the opinion of Chief Justice WHITE in the *Toledo* case in this Court, 247 U. S., 402, at page 415.

In the same case in the District Court, *United States* v. *Toledo Newspaper Co.*, 220 Fed. Rep., 458, Judge KILLITS said, at page 503:

> "Unless a publication plainly tends to affect the administration of a pending case, our conception of Section 268 requires that it be not considered a *misbehavior*, no matter how aggravating or unfair it may be."

A close study of the record in that case shows that: There were three matters then pending before Judge KILLITS awaiting decision, each unrelated, and they were as follows:

(a) An injunction had been applied for and had not yet been granted, Judge KILLITS announcing from the bench that he would have to consider whether the Court had jurisdiction to issue the injunction.

(b) As soon as that happened, this being a big railroad fight and the question being whether the

rate of fare should be three or five cents, one Quinlivan started to harangue the people on the afternoon of the day of Judge KILLITS' announcement and advised them that they should not pay any fares but ride on the cars free. In fact they did so. Judge KILLITS forthwith issued an attachment for him to show cause why he should not be punished for contempt. So that matter was a pending matter.

(c) As soon as the attachment was issued, the newspaper started a great hubbub about Quinlivan and the Judge, and what was going to happen. As soon as that occurred, the Judge issued an attachment against Howard, the managing editor. So that was pending.

(d) With those *three proceedings pending* in the Court *sub judice*, the most violent attack of all came, and it was because of these attacks made upon him, while those three matters were under consideration, that Judge KILLITS came to the conclusion above noted.

The Circuit Court of Appeals, in its opinion, referring to this phase (237 Fed. Rep., at p. 988), said:

> "It is undisputed that the newspaper publications had reference to the general subject-matter, *some phases of which were then pending in the District Court*, and had reference to the making and effect of the injunctional order, *the application for which was then pending.* * * * There was ample jurisdiction to justify punishing any contempt committed at this stage of the case." (Italics ours.)

The isolated criticism in this case bears no comparison with the extreme obstruction shown in the Toledo case, and yet Judge HOUGH in his concurring opinion in the Court below in the case at bar said:

> "We are bound to consider no more than the single question, whether such conduct with such intent could in point of law obstruct the administration of justice. It is my opinion that this question is answered in the affirmative by *Toledo, etc. Co.* v. *United States* (*supra*)" (Record, p. 1162, fol. 3484).

The learned judge did not, however, point out any respect in which the facts were proximate.

In order to give jurisdiction there must be an impact, physical or verbal, which tends to obstruct the delivery of justice.

In the *Toledo* case, the matters commented on were "in the bosom of the Court."

There must be a verbal or physical obstruction placed in the way of the Judge to actually prevent him from delivering or to influence him in delivering justice. Hence, when we come to apply the above principles of law to the case at bar, we find that the letter of the defendant dated October 6, 1919, signed by him in his official capacity as "Comptroller," and "in response to the invitation" (Record, fols. 155-156), set out in full in the Information, refers in its own plain terms, in every instance specified, *to past action taken by District Judge* MAYER *in regard to matters which had arisen in the suits and proceedings in the Court.* The letter does not concern itself, on its face, with any pending matter in such suits or proceedings. It is true that the letter does say that "as a first and preliminary evidence of good faith, *those who desire* such a *conference* and a reasonable solution of existing complications, *should procure* the entry of orders by Judge MAYER putting The City of New York on an equal footing with the private interests active in the receiverships" (Record, fol. 2208). That, however, was a condition precedent to official,

not judicial, action; it related to a possible conference of non-judicial officials, not to any pending or imminent decision by the Court. The conviction fails to predicate guilt upon that specific statement, but on the contrary confines the contempt to the alleged false statements "in paragraphs 1, 2, 3 and 4."

The Information does state that two suits and a proceeding are, and, during all the times thereinafter mentioned subsequent to the respective dates of their commencement, as thereinafter stated, had been pending in the District Court of the United States for the Southern District of New York. But nowhere in the Information is it alleged or stated that, at the time when it is charged that the defendant Comptroller wrote the letter to Lewis Nixon, Public Service Commissioner, there was pending before the District Court for deliberation or determination by Judge MAYER any motion or proceeding of any kind in either of the suits or proceedings, and the Return to the writ expressly admits that none such was pending. The abortive effort, by the voluminous court records put in evidence by the prosecuting attorney (Record, pp. 889-1128, fols. 2667-3383), to give the semblance of a pending determination, accentuates its absence. All of the opinions and acts set out in the Information were, at the time the defendant *Comptroller* wrote the letter, past acts, as to which the publication of the letter *could not constitute misbehavior tending to obstruct the administration of justice* within the purview of Section 268 of the Judicial Code, "no matter how aggravating or unfair it (the letter) may be," to use the phrase of Judge KILLITS (quoted *supra*). It is a matter of no consequence that the Information characterizes the letter as false, and as having been written wilfully, knowingly, unlawfully and contemptuously, because

there was no obstruction or no possible obstruction to the actual delivery of justice.

MORE THAN THE SEMBLANCE OF A CONTEMPT IS REQUISITE TO CREATE JURISDICTION IN THE COURT OF FIRST INSTANCE.

The criticism of a judicial act, long past, was no more than a *semblance of a contempt*. Its statement in the information was not of a crime, but of the mere ghost of a crime. The prosecuting attorney has argued, in effect, and the court below has said in effect, that if a crime be charged the only remedy is by demurrer and review on appeal; but, if only a semblance of a crime be shadowed forth in the Information, the Court cannot lay hold of it and assert jurisdiction thereby. It is too intangible to create even a pretense of jurisdiction. "Any other reasoning or rule would clothe a court or judge with absolute and unlimited power where it had jurisdiction of the subject matter of an action and of the person to imprison whosoever it pleased, and beyond the remedy of discharge on habeas corpus (Bailey on Habeas Corpus, Vol. 1, p. 271).

In *Matter of Gregory*, 219 U. S., 210, cited to support the prevailing opinion in the Circuit Court of Appeals below, this Court clearly recognized the distinction between colorable jurisdiction and jurisdiction of the inferior court when questioned on habeas corpus.

Mr. Justice HUGHES said (at p. 217): "But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, *unless it be meant that no colorable question was presented;* that on the agreed statement of facts and viewing the statute as prohibiting transactions involving the element of chance, *there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked,* and that *therefore* the

court had *no jurisdiction* to determine whether or not the statute had been violated * * * Given a valid enactment, the question (*assuming it to be one demanding judicial examination*) whether a particular case falls within the prohibition is for the determination of the Court to which has been confided jurisdiction over the class of offenses to which the statute relates" (Our italics).

We do contend that " no colorable question was presented" and that "there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked" by the criticism of judicial acts wholly past, and that there was and is no ground for "assuming it to be one demanding judicial examination."

In *Windsor* v. *McVeigh*, 93 U. S. 274, it was said at page 282:

> "The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. *It must act judicially in all things, and cannot then transcend the power conferred by the law.* If, for instance, the ac-

tion be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice MILLER, to the same purport, in the case of *Ex parte Lange*, 18 Wall. 163. So it was held by this court in *Bigelow* v. *Forrest*, 9 id. 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice STRONG, speaking the unanimous opinion of the court, replied: 'Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction.' Id. 350.

* * * * * * * *

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, *and does not transcend, in the extent or character of its judgment, the law which is applicable to it.* The statement of the doctrine by Mr. Justice SWAYNE, in the case of *Cornell* v. *Williams*, reported in the 20th of

> *Wallace,* is more accurate. 'The jurisdiction,' says the justice, 'having attached in the case, everything done *within the power of that jurisdiction,* when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.' 20 Wall. 250."

As was said by Judge HAND in his dissenting opinion below: "In the somewhat analogous case of obstructing the draft, the Supreme Court laid down the rule that the words must constitute 'clear and present danger' that the evil will result," citing *Schenck* v. *United States,* 249 U. S., 47, 52 (Record page 1171, fol. 3513).

With the greatest respect we submit that the office of Charles L. Craig, Comptroller of this City, both in his capacity as Comptroller and as a member of the Board of Estimate and Apportionment, an elected officer of the people, is important and needful, is hedged around with dignity and circumstance, just as the office of a Judge, and in the performance of his duty he must proceed fearlessly and untrammeled.

In the situation in which Mr. Craig found himself, he was not only proceeding along the lines of his duty, but he was led into making the expression which he did. In other words, the Public Service Commissioner was sitting there at a conference which the counsel for the Receivers had been directed to attend by the Judge (fols. 1112-1113) who was in control of the proceeding. Mr. Craig was invited — — an invitation in which the Court participated by directing its representative to attend — — so that in being asked to go to that meeting, and in answering the invitation it was as though the comptroller had been asked by the Court to act and *speak* freely. Why should the Comptroller be punished for *writing* freely in such a situation?

This conference was actually in the course of being holden, when the Comptroller's letter was physically delivered into Mr. Nixon's hand, as he sat upon the dais of the Public Service Commission room. So the matter was hedged about with every circumstance of officialdom that can possibly be conceived of (fols. 397-399).

The ordinary official method of performing matters of duty in the office of such an official as the Comptroller is by letter or written communication. The legislator speaks on his feet or acts in a committee; the Judge writes an opinion or delivers a charge, but when an official, such as the Comptroller of the City of New York, has an official duty to perform, his method of communication is, normally and naturally, that of a letter or a communication in that form. So we submit in every respect this was an official communication, by an official to an official.

He responded in writing because he could not respond in person, for, as appears on the face of the document, he was otherwise engaged with weighty public matters. The purpose of the communication was to make plain that he would not and could not, in justice to himself, or to those whom he represented, sit down and consider with the representatives of the railway interests, with a mind unilluminated by information from original sources, the subject matter to which his attention had been directed. The theme, the keynote, the ultimate stroke of the communication is that he would not sit down until he had that information from original sources, and that it was within the power and within the opportunity *of the persons with whom he was asked to sit down* to place him in possession of, or in a position where he might have that information, by an application on their part to the court for a reversal of the policy which

had entrenched them with information from original sources and which he, mistakenly or otherwise, felt that he had to possess, but which he stoutly affirmed that he did not possess. No one can draw any other meaning from the communication. That was its object; that was its purpose; that was its plain distinct affirmation. In other words he said, translated into the vernacular, that he would not sit at the table with the representatives of the railway interests, while they had their firearms with them, as he had not his. The communication is addressed to the attitude of his opponents, and was in no sense addressed to nor intended to reflect in the slightest degree upon the court. He criticised the result of the application for a co-receiver, as everyone criticises a result in a court of law, who does not completely accept it.

No one pretends but that in this receivership, as in most receiverships, where all of the parties have assented, the parties adopt a policy, and the court becomes responsible for that policy when it makes its orders and decrees in conformity therewith. No wrong is thereby imputed, but much criticism is usually evoked.

Traction difficulties in every large city are more prolific than any other subject of pointed and harsh criticism, for the obvious reason that the public must suffer and endure daily the inconvenience and disgruntlement—they must walk, or stand or talk, and they usually talk, and their elected officials talk with them or against them—there is no calm or dispassionate theorizing in the face of a traffic upheaval. The public officials have a policy—or, as is sometimes charged, have no policy. They must stand criticism. And the Courts who shape or adopt a policy in running the railroads ought not to be beyond criticism.

The letter, as a whole, shows that the Comptroller had made application, at the direction of the Board of Estimate and Apportionment of the City of New York, for appointment as a co-receiver, to serve without compensation, for the purpose of having access to original sources, and that Judge MAYER in the proceedings had held there was no need or occasion, at that time at least, for the appointment of a co-receiver. All that Judge MAYER had done is co-extensive with all that the Comptroller urged, on the other side, had been denied to him, according to his theory or his construction, viz., that while *information* was directed to be given, *access* to original sources had not been provided, and in effect had been denied, by the refusal to appoint the City's representative as co-receiver. The insistence of the Comptroller was that he wanted information from original sources and he wanted that information as a matter of right not as a matter of mere information or favor from the files, pursuant to directions to the receiver; he wanted access to evidence, such as a co-receiver would be able to get, not information doled out. No one, under any direction that he gets from a court to be afforded information from the records or files of a great railway system, could ever succeed in getting complete or reliable knowledge, upon which to act officially, unless he had an equal opportunity, through possession of the records, to examine and to delve into and to go down to the bottom. That is common knowledge, of which the Courts take notice. But regardless of common knowledge, that was the Comptroller's honest belief, mistaken or otherwise. As an illustration, we know that in the ordinary search for evidence, even where an order for examination of a party before trial is made, the pursuit is usually paralyzed unless it is aided by an order for discovery and inspection, and a man

is baffled at every turn, by those who do not know the facts at first hand or by those who, having possession of the documents and papers for years and years back, have either suppressed the information or paralyzed the arm of the court, so that the court itself shall not get at the facts. What was taking place in the City of New York at the time was naturally in the mind of the Comptroller. An investigation was afoot of the rights, obligations and relations of these inter-allied and inter-related railway companies which were applying directly or indirectly to the public conscience of a public body of which he was a member for relief of one kind or another.

It is clear to anyone reading this letter that the difference between Judge MAYER'S direction as to the publicity of these records and that of the writer of the letter was, that Judge MAYER felt and thought that the receiver and those acting under him, and upon whom he was depending, were going to be as honest and open with the Comptroller of the City of New York and the Board of Estimate and Apportionment as though there was no interest adverse to the City.

The Comptroller had taken a position which with him was a conviction—an obsession, if you like—that he could only get access to original sources by his appointment as co-receiver; and, on the other hand, there was the Court who had directed these books to be thrown open, and who felt that by the throwing open of those books that all information that anyone could need or want was accessible to the public. These are the two different views, considered from the standpoint of two different persons —one, the Court, and the other, the Comptroller.

It would have been a sort or kind of presentation of this matter if the Comptroller had written in this letter the precise things that the Court had

done, and if he had then concluded with the statement that, notwithstanding what the Court had done, the court had still failed to realize or appreciate what he, the Comptroller, mistakenly or otherwise, thought should have been and should be done. The letter might have been written in that way, and would have been as truthful as one could want, and it is, perhaps, a regrettable circumstance that it was not written in that way, but a regrettable circumstance constitutes no sufficient ground of prosecution for contempt.

While it needed no testimony to make plain the meaning of the letter, the Comptroller testified that when he charged that he had been denied access to original sources of information he meant that he had been denied the right to go through or to dig down into these sources of information which alone would be useful to him in the discharge of his duties as Comptroller; that without that he could not proceed; that his official judgment and his official conscience could not be moved until he had had access to the original sources of information (fols. 1833-1835).

He was familiar, because he was a lawyer, with the trivial results that flow from a polite request or even a general official direction addressed to a receiver of a corporation, and passed upon by some former officer or servant of the corporation who has been retained in the service of the receiver; and he knew the futility of such a thing.

THE STATEMENT THAT THE COURT HAD DENIED ACCESS TO ORIGINAL SOURCES OF INFORMATION WAS NOT TANTAMOUNT TO A CHARGE OF MISCONDUCT, BECAUSE NEITHER THE PUBLIC NOR THE COMPTROLLER WAS A PARTY TO THE PROCEEDINGS, NOR ENTITLED, AS SUCH, TO THE ACCESS AS MATTER OF RIGHT.

Although the public and its officials were concerned to a vast extent in the rapid transit situa-

tion, they were not interested, in the strict or proper sense, in the litigation, because they were not parties, and, therefore, were not entitled as matter of right to access to original sources. The charged denial of that opportunity was, therefore, not a charge that justice had been denied, nor any imputation upon the honor or integrity of the Judge, but rather that the Judge had not effectively secured the paramount interests of the public, as the Comptroller conceived them to be.

The Court had concluded that the interests or voice of the public, as expressed in the application for the appointment of the co-receiver, were not paramount to or co-extensive with the rights of the parties, in the sense that the people were not entitled to have representation then through a co-receiver. Or possibly the Court felt that the Board of Estimate was not entitled to voice the wishes of the public, or that some other official or body was solely entitled to speak for the public, or that the Court understood better what was needed and proper. Anyway, the court had held that the public was not then entitled to representation in the receivership. The public was not a party.

If the letter had charged that the Court had denied access to John Doe, who was not a party, or to a million John Does, who were not parties, no one would have given even a passing thought to the charge, and yet that is what the charge or criticism amounts to and nothing more.

If the Judge had not been charged with denying to the *public* officials access, no one would have thought for an instant of instituting this proceeding.

But public officers—no less those who are appointed than those who are elected—are sensitive, and rightly so, to the slightest suggestion that they have denied the wishes of the public, and yet it has

been not only the duty but the opportunity of great judges to deny the wishes of the public, however, or by whomsoever expressed, on momentous occasions.

It appears that when the letter was delivered into the hands of the Commissioner, one of the counsel for the receivers, said that the letter was false, and actually asked that a copy of it be delivered into his hand, went forthwith to the chambers of Judge MAYER and rubbed the letter under the eyes of the judge and said, in effect, to him, or someone else in his presence (fols. 1174-1177): I wish to call your attention to the fact that this false letter has been written. Judge MAYER in his opinion wrote of the human desire entertained as much by judges as by others for the good will and confidence of the community (fol. 2490), but in conclusion said, "It is not a wrong with which the judge concerns himself in a personal sense" (fol. 2509). No human being could have a word or communication presented to him under these circumstances, official or otherwise, with the statement that it had been characterized as false with respect to him, who would not feel that he had been affronted.

The Court was acting in an administrative or ministerial capacity, not in a strictly judicial character. Criticism of, or even an imputation against acts done in an administrative capacity does not constitute contempt.

The Judge before whom the receivership proceedings were pending, himself, had characterized his relation to the proceeding as administrative (Ex. 42, at fols. 3164-3165).

The theme of the letter relates to *administration* of the receivership and the policy with respect thereto, language which is exclusive of purely judicial functions.

Where the Judge is acting in an administrative or ministerial capacity, criticism of his acts is not

a criticism of or interference with the Court, of such a character as to sustain a charge of contempt.

A judicial proceeding is the decision of a controversy between parties, and there the Judge acts as the representative of justice. It is out of such a situation that the theory of contempt was born. But the receivership and all of its incidents, though in form judicial, was really administrative; it was on questions concerning the administration of property, in large sense, that the alleged contempt arose The information shows on its face that the Judge was engaged, practically, in administering a vast property in which the public was concerned. Questions of general policy, of detail, of public interest were necessarily involved.

In the opinion of ROGERS, *C. J.*, below, he refers to the fact that an opportunity was given to the petitioner to make a retraction (fol. 3408, p. 1136). Vide fol. 2510, p. 837. Long before that the petitioner after fully setting forth all of the surrounding circumstances of the writing of the letter, had testified as follows:

> "Q. Now, in writing this letter did you have any intention whatever of a contemptuous act toward Judge Mayer? A. Certainly not. Let me add, I had, as I said this morning, an intention, and the only intention I had was to get into the mind of Lewis Nixon a state of facts which he could verify at any stage from various sources, and which once he had in mind would impel him to follow out the suggestion I embodied in the letter; so that there could be freedom of discussion and a solution of these difficulties.
>
> "Q. Now I will put the question impersonally: In writing this letter, did you have any intention to commit any contemptuous act toward the Court? A. I did not.
>
> "Q. Did you have any intention to charge any misconduct, ignominy or wrongful conduct

of any kind or character toward Judge Mayer, or toward the Court? A. No. (Record, fols. 2017, 2018, p. 673.)

Riddle v. *Dyche,* decided by this Court May 21, 1923, but not yet officially reported, United States Supreme Court Advance Opinions, 1922-23, 67 L. Ed. 612 (June 15, 1923), in no way restricts such an inquiry into the jurisdiction as we contend for. In that case an attempt was made to show the contrary of a matter expressly determined in the record. In the case at bar the petitioner alleged and showed facts "not inconsistent with the record" which overcame any presumption in favor of the District Court on the jurisdictional points involved, especially in view of the qualified findings in the record and the limited scope of the offending as declared (Record, pages 838-839, fols. 2514-2515).

Because, therefore, of the limited scope of the facts appearing on the face of the Information itself, as restricted to criticism of past acts, and in the conviction, coupled with the express admission in the Return to writ, the Court, being limited in its power to punish for obstruction, acted in excess of its powers, and the proper relief was by habeas corpus, as appears in Point VIII, *infra.*

POINT III

The Circuit Judge had jurisdictional authority to issue the writ of Habeas Corpus.

If the circuit judges have not now the jurisdictional authority to issue writs of habeas corpus, it is because their jurisdictional authority, which up to the passage of the Judicial Code indubitably existed, has been lost, not by the deliberately expressed will of Congress, but as an incidental and unintended result of an Act which sought merely

to merge into the District Courts the Circuit Courts, in which the circuit judges served, and which did not in terms deprive them of their power as judges.

Prior to the enactment of the Judicial Code, which merged the courts and vested the powers of the Circuit Courts in the District Courts, the circuit judges, as such, had jurisdictional power to issue the writ of habeas corpus, not only by virtue of the provisions of the Habeas Corpus Act (*Statutes of* 1867, *Chapter* 28, 14 *Statutes at Large* 385, *Feb.* 5, 1867), which was in effect when the Circuit Judges were first appointed and which gave the power to "the several courts of the United States and the several justices and judges of such courts," but by virtue, also, of the provisions that, when appointed, they were given, in the Circuit for which they were appointed, the "same power and jurisdiction therein as the justice of the Supreme Court allotted to the Circuit" (*Act of April* 10, 1869).

Clearly, the mere fact that a *court* is merged does not deprive the *judge,* whose office still continues, of any jurisdictional power vested in him, *qua* judge. By the Habeas Corpus Act of 1867 the jurisdictional authority to issue the writ was vested in the "several courts of the United States and the several justices and judges of such courts within their respective jurisdictions," and subsequently, on the appointment of Circuit Judges, by the Act of April 10, 1869, and the still later codification in the Revised Statutes, the jurisdictional authority to issue the writ was vested in "the Supreme Court and the Circuit and District Courts" (R. S., Sec. 751), and upon "the several justices and judges of the said courts" (R. S., Sec. 752), and again by Sections 754, 755, 757, 758, 760, 761, 762 and 763 the jurisdictional power of the justices and judges is repeated.

These justices and judges are described in the

Revised Statutes as "the several justices and judges of the said courts," but since they were in fact "Justices of the Supreme Court," and "circuit judges" and "district judges" this was but a short way of describing the officers in whom was vested the jurisdictional authority. The statute might as well have read, and, in the ordinary vernacular, would have read "the Justices of the Supreme Court, the circuit judges and the district judges," or "United States Judge," as in Section 6 of the Chinese Exclusion Act of 1892, or "Judge of the United States" as in Section 1014, Revised Statutes, which would have had the same meaning as the words actually employed.

The object and purpose of the applicable provisions of the Judicial Code were to get rid of superfluous courts, court officers and records, not to circumscribe the jurisdictional power of the judges. That was quite evidently not in the mind of the Congress at all. We undertake to say that if, while the Judicial Code was under consideration in the Senate, a member of that body had risen in his place and asked the Senator in charge of the bill whether it was intended by the proposed legislation to deprive the circuit judges of the jurisdictional authority which had theretofore been conferred upon them to issue writs of habeas corpus, a negative answer would have unhesitatingly been made.

These views are not out of harmony with the decision of this Court in the case of *Whitney* v. *Dick*, 202 U. S., 132; for there the question was as to whether *an additional jurisdictional power had been conferred* upon a new Court of Appeals, not whether a judge of the court had been deprived of any of the jurisdictional powers which he had theretofore exercised, *qua* judge.

The jurisdictional powers of the court and the jurisdictional powers of the judge are distinct. *U.*

S. v. *Clarke,* 1 Gall., 497, 499 (STORY, *J.*). To deprive the judge of his powers should require something more than a conclusion drawn from a drily literal application of language clearly intended to deal only with the courts, *qua* courts.

We feel that it may fairly be said that never in judicial history has a judge lost any of his jurisdictional powers by implication.

In questions of great moment, it had happened in the nation's history, and it will happen again where a person has been restrained of his liberty, that a judge of the District Court has not only felt but expressed his reluctance to interfere with the committing power of another judge of co-ordinate jurisdiction. (In this respect, see the opinion of Judge WALLACE, refusing to discharge a prisoner merely because a judge of co-ordinate jurisdiction had made the commitment, *In re Hale,* 139 Fed. 496, 504). If the opinion of the Court below stands, the district judges will be more loath than formerly to grant the writ. In such a case a circuit judge, who is aloof from a district judge, would doubtless more readily exercise the power, although it were in reality the identical power drawn from the Habeas Corpus Act. The only "other and appropriate sources of judicial power" (*Ex parte Tracy, petitioner,* 249 U. S., 551) are Justices of the Supreme Court and the Supreme Court itself, which should be relieved of such applications whenever possible.

The Constitution, Clause 2, Section 9, Article 1, provides that

> "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

The policy of the United States has been in the direction of extending and not of abridging the

advantages of the writ of habeas corpus. The Constitution provides:

> "the *privilege* of the writ * * * shall not be suspended * * *"

Under the English practice, the Habeas Corpus Act itself is suspended in time of war or other great exigency, the effect of which is to prevent the issuance of the writ, and not merely to suspend the privilege of the writ. Under our Constitution "The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the Court decides whether the party applying is denied the right of proceeding any further with it." *Ex parte Milligan,* 4 Wall., 2, 130-131.

This policy of maintaining and extending the efficacy of the writ is further evidenced by the Acts of Congress in conferring jurisdiction to issue it widely. Not only were the *Courts* given authority, but the same authority was conferred upon the individual *Justices* and *Judges* as well. All this is evidently out of tenderness for individual liberty.

The First Judiciary Act of September 24, 1789, Statutes at Large, Section 14, provided as follows:

> "Section 14. And be it further enacted, That all the before-mentioned courts of the United States (Supreme Court, Circuit Courts as then constituted and District Courts) shall have power to issue writs of scire facias, habeas corpus and all other writs * * * necessary for the exercise of their respective jurisdiction and agreeable to the principles and usages of law. And that either of the *justices* of the Supreme Court, as well as *judges* of the district courts shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."

There was then no Circuit Judge; the office was not created until 1869.

The power of the Supreme Court itself to issue a writ of habeas corpus under the Judiciary Act of 1789 was questioned as early as 1807. In that case, referring to the provisions of the Constitution, and to the Judiciary Act, just quoted, Chief Justice MARSHALL said:

> "It may be worthy of remark that this Act was passed by the first Congress of the United States sitting under a Constitution which had declared 'That the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.'
>
> "Acting under the immediate influence of this injunction (of the Constitution), they must have felt, with peculiar force, the obligation of providing efficient means by which this great Constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."

Ex parte Bollman, 4 Cranch, 74.

It will be observed that by this Act of 1789 the power to issue such writs was confined with respect to justices and judges, as distinguished from courts, to Justices of the Supreme Court and Judges of the District Court. At that time there were no Circuit Judges *eo nomine.* The Statute of 1789 is important as the first step in the development of the law. Referring to that Act in *ex parte Milligan,* 4 Wall. 2, at p. 110, this Court said:

> "Chief Justice MARSHALL, in *Bollman's* case, construed this branch (the 14th section) of the Judiciary Act (of 1789) to authorize the courts *as well as the judges to issue* the writ for the purpose of inquiring into the cause of the commitment, and this construction has never been departed from."

After the Act of 1789 came:

Statutes of 1833, Chapter 57, Section 7, 4 Statutes at Large, 634:

> "And be it further enacted that either of the Justices of the Supreme Court or a Judge of any District Court of the United States in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus."

There were not yet any Circuit Judges *eo nomine*. The first statutory provision fully covering habeas corpus, known generally as the Habeas Corpus Act, was Statutes of 1867, Chapter 28, 14 Statutes at Large, 385, February 5, 1867:

> "That the several courts of the United States and the several justices and Judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States; and it shall be lawful for such persons so restrained of his or her liberty to apply to either of said Justices or Judges for a writ of habeas corpus * * * said Justice or Judge to whom such application is made shall forthwith award a writ of habeas corpus unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States."

The Statute of 1867 came before this Court for construction in the case of

Ex parte McCardle, 73 U. S., 318, 325.

Chief Justice CHASE, referring to the first section of the Act, said:

> "The first section gives to the several courts of the United States, and the several justices

and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

"This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of *every judge* every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

The following language of Justice BREWER in *Whitney* v. *Dick,* 202 U. S., 132, 136, is also significant:

"It is doubtless true that if the language of the Court of Appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of *habeas corpus,* the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *ex parte Bollman,* 4 Cranch, 75. The fourteenth section of the original judiciary act contained this language: 'That all the beforementioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs, not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' And the question presented was whether the grant of power to issue a writ of *habeas corpus* was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice MARSHALL, delivering the opinion of the court, partly on

> the grammatical construction of the section and partly on the significance and importance of the writ itself. But in the Court of Appeals act there is no mention of *habeas corpus*, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing."

(Certain provisions of the Act of 1867 relating to appeals from the Circuit Court to the Supreme Court of the United States were repealed by the Act of March 27, 1868, 15 Statutes at Large, 44, but such repeal is unimportant to the consideration of the precise point before the Court in the instant case. Moreover, the repealing clause of the Act of 1868 disappeared by the amendment of the Act, March 3, 1885.)

The next act of importance is that of April 10, 1869 (16 Statutes at Large, 44), entitled "An act to amend the Judicial system of the United States," *providing, for the first time, for the appointment of Circuit Judges.*

Section 1 provided for the increase of the number of Supreme Court Judges to nine.

Section 2 provided as follows:

> "That for each of the nine existing Judicial Circuits there shall be appointed a Circuit Judge who shall reside in his Circuit and shall possess the same power and jurisdiction therein as the Justice of the Supreme Court allotted to the Circuit."

By the terms of this Act there was conferred on Circuit Judges all powers theretofore possessed by Justices of the Supreme Court, including the power to issue writs of habeas corpus. No Circuit Judges having been appointed at the time that the Habeas Corpus Act of 1867 went into effect, the language of that Act: "The several Justices and Judges of such Courts within their respective juris-

dictions," did not apply to Circuit Judges at the time of the passage of the Act. But when the Circuit Judges were appointed by the Act of 1869, quoted above, there was conferred upon them all of the powers of Supreme Court Justices within their respective Circuits one of which was the power to issue writs of habeas corpus, which always inhered in the office of Supreme Court Justice.

The Circuit Judges received a baptism of power to issue this writ at the moment of their appointment; and this power did not originate in or spring from the panoply of a Court.

The Act of 1869, providing for the appointment of Circuit Judges, was re-enacted in substance in Section 607 of the Revised Statutes reading as follows:

> "For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court, allotted to the circuit * * *. Every circuit judge shall reside within his circuit."

We return now to the main thread of the statutory enactments relating to the subject of Habeas Corpus.

The Habeas Corpus Act of 1867 was transposed into the Revised Statutes of 1873-1874 and became Sections 751 and 752, differing but slightly in phraseology.

It will be observed that the words of the Habeas Corpus Act of 1867, reading as follows:

> "That the several courts of the United States and the several Justices and Judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus," etc.

were split into two sections by the Revised Statutes of 1873-1874 and became:

> "Section 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus."

and

> Section 752. The several Justices and Judges of the said Courts, within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

Under the familiar canons of statutory construction, the revision of the language of the Habeas Corpus Act, without any apparent intention to change its effect, brought about no substantial change in the law, so that the specification of the several courts of the United States as: "the Supreme Court and the Circuit Court and District Courts" meant substantially what it did in the first place in the Habeas Corpus Act of 1867, namely, that the power was conferred upon the "several Justices and Judges of such courts," to wit, the Supreme Court and the District Courts, *as expanded by the Act of 1869,* appointing Circuit Judges and giving them the same power, within their jurisdiction, as Supreme Court Justices.

There never has been an express change in the Habeas Corpus Act of 1867 except in its revision by the Revised Statutes. The word "Circuit" has been bracketed by compilers to indicate that it has been omitted, in the enumeration of the courts, in various annotated compilations of the laws of the United States, but *has not been physically struck out of the section.* The Habeas Corpus provisions remain exactly as they were.

It is an "elementary rule that a special and particular statutory provision affording a remedy for

particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible" (*Ex parte United States*, 226 U. S. 420, 424, citing *Petri* v. *Creelman Lumber Co.*, 199 U. S., 487).

(For purposes of historical completeness we may make mention, in passing, that on August 29, 1842, there was enacted Chapter CCLVII, known as 5 Statutes at Large, 539, but it is not directly important to the subject in hand. Its terms are limited to "subjects or citizens of a foreign State.")

This Court has shown no tendency to restrict the "appropriate sources of judicial power" to issue the writ.

Ex parte Tracy, petitioner, 249 U. S., 551, *per curiam*,

> "For the purpose of redressing assumed violations of the Constitution and laws of the United States *by means* of habeas corpus, the jurisdiction *of other competent courts* to afford relief *may not be passed by* and the original jurisdiction of this Court be invoked in the absence of exceptional conditions justifying such course (*Matters* v. *Ryan*, 249 U. S., 375, *ante*).
>
> "When leave to file the petition for habeas corpus was previously denied, without a suggestion as to the existence of any exceptional condition which would have justified a contrary view, such refusal presumably was based on *the existence of the right to seek, if desired,* other and appropriate sources of relief. From this it follows that although we pass the application of the doctrine that the refusal of habeas corpus is not the thing adjudged, precluding a subsequent granting of such writ upon the same facts, nevertheless there is here no reason to grant the order prayed, since the previous order rested upon *the right and duty to petition for relief, if habeas corpus was*

desired, to other and appropriate sources of judicial power." (Italics ours.)

What are the "other and appropriate sources of judicial power" thus referred to? Are they confined to district Courts and District Court Judges, in view of the broad general grant in the Habeas Corpus Act of power to "the several courts of the United States and the several Justices and Judges of such Courts"? Or do such sources include Circuit Judges?

What reason has been suggested or can be suggested why Circuit Judges, who, from the time of their creation, possessed, enjoyed and exercised, in numberless cases, the right and duty to issue the writ of habeas corpus, should be stripped of that right? It cannot have resulted from the mere fact that the Circuit Judges sit in a Court of Appeals. The Circuit Judges are just as competent now as they have always been to issue the writ. If they have lost the right, it must have been by indirection.

The question presents three aspects:

1. What was the meaning of the *Judiciary Act* of 1789, confirmed by the Act of 1833, giving the power to issue the writ to Justices of the Supreme Court and to Judges of the District Courts, as expanded by the Law of 1869 conferring on the newly appointed Circuit Judges the same power and jurisdiction, within their respective jurisdictions, as Justices of the Supreme Court?

2. Is there any doubt that the *Habeas Corpus Act* of 1867 conferring the right on Justices of the Supreme Court and Judges of the District Courts, was expanded by the Act of 1869 conferring on the Circuit Judges, within their jurisdictions, the same powers as Supreme Court Justices? The Habeas Corpus Act has never been changed in substance; it has been merely codified in the Revised Statutes.

3. Was any repeal of the power of Circuit Court Judges to issue the writ effected by the *Judicial Code,* merging the Circuit Court into the District Court? As the inquiry is limited, in the instant case to the jurisdictional powers of a judge, *qua* judge, the abolition of the Court, in which he usually sat, or the transfer of its powers, would appear to be of slight, if any, significance. In *Ex parte United States,* 226 U. S. 420, 423, this Court said:

> "It is of course undoubted that Chapter XIII of the Judicial Code, while not interfering with the tenure of office of the Circuit Judges, abolished the Circuit Courts."

A very material consideration, we submit, is that when Circuit Judges were created no new Court was created—the Circuit Court was already in existence. The Circuit Judges took their places on the bench of the Circuit Court. As the Circuit Judges did not derive their origin from a Court, it is hard to see how they could lose any of their powers or jurisdiction, as Judges, by the abolition or merger of the Court in which they usually sat.

The holding of the lower Court is, in effect, that by the abolition or merger of the Circuit Court, the Circuit Judges were shorn of all of their powers —nothing was left to them except their bare titles— and that they were re-clothed with the power, and only with the power, to sit on the bench of the Circuit Courts of Appeal.

We know, however, that they retained jurisdiction to sit under the Expedition Act (*ex parte United States,* 226 U. S. 420, 423). Furthermore, they retained jurisdiction to sit under the Chinese Exclusion Act of 1892, §6: "The designation of the Judge, in general terms, as 'a United States Judge' is an apt and sufficient description of a Judge of a Court of the United States, and is equivalent to or synonymous *with the designation, in other statutes, of the Judges authorized to issue writs of habeas*

corpus, or warrants to arrest persons accused of crime" (citing Rev. Stat., §752, 1014) *Fong Yue Ting* v. *United States,* 149 U. S., 698, 728. The Circuit Judges are comprehended within the category of "any Justice or Judge of the United States" in §1014 of the Revised Statutes relating to the arrest and holding or bail of persons accused of crime. They also may, without designation, grant injunctions or restraining orders in cases pending in the District Courts of their Circuits (Judicial Code §264) and upon designation by the President, act as a Judge of the Court of Customs Appeals (Judicial Code, §188). As the Circuit Judges retained these several powers as Judges, under the separate acts conferring them, notwithstanding the abolition or merger of the Circuit Courts by the Judicial Code, how can it be said that they were, by the Judicial Code, shorn of the power conferred by the separate Habeas Corpus Act, unrepealed, to issue the great writ, which they had exercised in numberless instances covering over half a century, of which *Carper* v. *Fitzgerald,* 121 U. S., 87; *McKnight* v. *James,* 155 U. S., 685; *Lambert* v. *Barrett,* 157 U. S., 697; *In re George Macdonnell,* 11 Blatchford, 79; *Ex parte Schmeid,* 1 Dillon, 587; *In re King,* 51 Fed., 434; *Ex parte Davis,* 112 Fed., 139, and *Ex parte Jacobi,* 104 Fed. 681, are instances.

A policy thus manifested by definite Acts of legislation cannot be assumed to have been reversed (or minimized) simply because Congress in abolishing a *Court* may be considered to have used language which construed strictly and without regard to the purpose or spirit of the legislation may have rendered the words describing the officers who are vested with the authority to issue the writ no longer technically or literally applicable to one class (and a numerous and highly responsible

class) of Judges. It would be a violent assumption that in dispensing with the machinery of a Court, Congress intended to strip the Judges thereof of their own inherent powers, especially where the act was not to be "construed to prevent any Circuit Judge holding District Court or serving in the Commerce Court, or otherwise, as provided for and authorized in other sections of this Act" (Judicial Code, §118). The exercise of this power by a Circuit Judge is well exampled in the leading case before this Court of *Carper* v. *Fitzgerald,* where the Circuit Judge at his Chambers in Baltimore granted the writ and the papers were sent on to the Clerk at Richmond, Virginia, and this Court held that the order made by the Circuit Judge was not a Court order but a Judge's order.

The thought above expressed is in line with the expression of Chief Justice MARSHALL in *ex parte Bollman,* that if the exercise of the writ be curtailed the privileges of the writ itself will be lost. How can it be said that, when acting as Circuit Judge, Judge MANTON was acting solely as a Judge of the Circuit Court of Appeals, as was implied by the majority judges of the Court below (Record, page 1138, fol. 3414, page 1160, fol. 3478).

A general act does not repeal a special act, unless the intention clearly appears (*Ex parte United States,* 226 U. S., 420).

It is a settled rule of statutory construction that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction (*Ex parte Webb,* 225 U. S. 663, 683).

We submit that there is no escape from the proposition that if, by the Judicial Code, the Circuit Judges were stripped of the power to issue habeas corpus, they were stripped of all of their powers, and, since then, have had only such powers and jurisdiction as they were re-clothed with by the

Judicial Code. And yet we have seen (pp. 65-66, *supra*) that they have retained jurisdiction to do many acts in the capacity of Judge and have other functions than those of a member of the Circuit Court of Appeals.

In this age the tendency of judicial interpretation is to expand rather than contract the capacity and usefulness of Judges. There is certainly need for their utmost activity, and we have been admonished, ever since the time of Chief Justice Marshall, that it can be no better employed than in giving effect to the Habeas Corpus Act, lest the means failing the writ itself would be lost.

In the instant case, Circuit Judge MANTON was the regularly acting Judge holding the chambers part of the District Court, under designation, when the writ was issued (*Record,* pages 868, 869, fols. 2604, 2605; pages 881-886, fols. 2643-2658). He was the judge before whom it was our duty to go and he was the judge whose business it was—using the word in its proper sense—to issue the writ.

But, though thus designated, the point of the jurisdiction and power of a Circuit Judge to issue a writ of habeas corpus is necessarily involved, for only by holding that a Circuit Judge had no such jurisdiction or power, and that the order was an order *of the District Court,* did the Circuit Court of Appeals below assert jurisdiction to hear and decide the appeal, notwithstanding the petitioner's motion to dismiss the appeal.

So long as the order discharging the Comptroller remained effective, the capacity in which Judge MANTON had acted, whether as Circuit Judge or under designation to perform the duties of a District Judge, did not appear to be important, and the question seemed to be a moot one.

Now, however, that the Circuit Court of Appeals has based its own jurisdiction to entertain and de-

cide the appeal solely upon the ground that the order is an order of the District Court, and is not an order of a Circuit Judge, because of lack of power in a Circuit Judge to make the same, the case requires the proper decision of the question whether a Circuit Judge has such power.

POINT IV

In issuing the writ, Circuit Judge Manton, in addition to his powers as a circuit judge, was exercising the powers of a district judge, under designation.

Under the designation, by the senior Circuit Judge, of Judge Manton to sit in the District Court at the time that the writ was granted (Record, fols. 2604-2605), he, as Circuit Judge, drew to himself, or had conferred upon him any additional powers that a District Court Judge in Chambers might exercise. By the combined prerogatives of Circuit Judge and District Court Judge, Judge Manton had indisputable right to grant the writ.

This Court has explicitly held:

> "The statute (the Judicial Code, §§14, 18 and 19) while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, * * * clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned acording to law."
>
> *Ex parte United States*, 226 U. S. 420, 423, 424.

But the majority judges of the Court below completely disregarded this ruling (*Record*, page 1137, fols. 3409, 3410; page 1160, fol. 3478). For the

purpose of asserting jurisdiction, they viewed the order appealed from as an order *of* the District Court, whereas in fact it was not a court order, but a judge's order, as determined in *Carper* v. *Fitzgerald,* 121 U. S. 87.

Counsel for the petitioner stated in the habeas corpus proceeding that he not only intended to present the question to Judge Manton as a Circuit Judge, but "in a formal way to ask your Honor to take judicial notice of the fact that you were at that time designated *as a District Judge*" (fols. 2622-2627).

At that time, the return had not been filed, nor, of course, had the traverse been filed. After that the traverse was filed and counsel for the petitioner presented in a formal way the designation referred to, which was annexed to the traverse (fols. 2604-2605) and is part of the evidence, so that if the designation be not judicially noticed, proof of it was before the Court, as well, also, that he was the only judge attending to chambers business in the District Court or of the District Court Judge on February 24, 1921, when the writ was granted (fols. 2645-2655).

There is no need for petitioner to stand upon one ground alone, when two exist contemporaneously; nor can he be, nor should he be, forced to an election, or to imperil his remedy upon choosing between one or the other of the official capacities which Judge Manton possessed, in connection with this writ. It is not a case of one or the other; it is a matter of *both*. When Judge Manton exercised one, he exercised the other.

The Judicial Code provides as follows:

> "Whenever, in the judgment of the senior Circuit Judge of the Circuit in which the district lies, or of the Circuit Justice assigned to

such Circuit, or of the Chief Justice, the public interest shall require, the said Judge, or Associate Justice, or Chief Justice, shall designate and appoint any Circuit Judge of the Circuit to hold said District Court" (Judicial Code, Sec. 18).

The amendment of Chapter 18 of the Laws of 1913 related only to the addition of the second paragraph of Sec. 18 of the Judicial Code which does not affect the instant proceeding. This section is only important in the present instance as a basis for the exercise of the powers prescribed by the succeeding section.

"Sec. 19. It shall be the duty of the district or circuit Judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed, and all the acts and proceedings in the courts held by him, *or by or before him,* in pursuance of said provisions, shall have the same effect and validity as if done by or before the *district judge* of the said district."

The designation of Judge Manton, in force at the time the writ was issued, read as follows:

"In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended, I hereby designate and appoint United States Circuit Judge Martin T. Manton, to hold a session of the District Court of the United States, for the Southern District of New York, for the trial of causes and the hearing and disposition of such *ex parte* and other business as may *come before him* during the period beginning February 1st, 1921, and ending March 5, 1921" (fols. 2604-2605).

It will be observed that the words of the Statute are in the first place:

(a) shall designate and appoint any Circuit Judge of the Circuit to hold said District Court (Section 18), but the following section does not limit the Judge so designated to holding the Court; it provides that "all the acts and proceedings * * * *by or before him,* in pursuance of such provisions, shall have the same effect and validity as if done by or before the *district judge of the said district.*"

The use of asterisks in the clause last quoted is merely for perspicacity. We are confident that the omission indicated does not change the true or full meaning of the section, which is quoted above in its entirety.

The designation, it will be observed, follows the lines of the Statute, but expresses the acts which Judge Manton was designated to perform in somewhat different language, *inter alia* "and other business as may *come before him* during the period." Surely the granting of the writ of habeas corpus, as in this instance, would most appropriately be included within the terms of the Statute "by or before him," and the language of the designation "and other business as *may come before him.*"

In other words, the power, if any, that Judge Manton exercised, flowing from his designation, was *pro hac vice* the power of a judge of the District Court. While designated to hold a District Court, that was not the boundary of the designated powers, but out of and from the designation proceeded the power and authority to perform "All the acts and proceedings" "by or before" the Circuit Judge designated to sit in the District Court, with "the same effect and validity as if done by or before the District Judge of the said District."

By virtue of the Statute and the designation, there were conferred upon Judge Manton the *addi-*

tional powers, if any, of a District Judge, and by the exercise of those powers he *drew unto himself* as a Circuit Judge such additional powers. There was conferred upon Judge Manton the power to hold a District Court, but only when, holding the District Court, strictly as such, were his official acts those of a Court; at all other times, as contemplated by the Statute and by the designation, when the Court was not in session, Judge Manton was performing the acts of the District Judge, as such, and, while performing them, he was still a Circuit Judge.

A Circuit Judge can no more lay aside his title and powers of Circuit Judge than could he be stripped of them; he is always a Circuit Judge (*McCarron* v. *The People,* 13 N. Y., 74), and sometimes—that is to say, when sitting in the Court of Appeals—he is a Judge of that Court, and when designated to hold the District Court, all the acts and proceedings in the Courts held by him, or by or before him have the same effect and validity as if done by or before the District Judge, but he is never a District Judge.

A Justice of this Court when holding, with other Judges, a Circuit Court, was not a Circuit Judge, though he functioned as a Judge of the Circuit Court.

REGARDLESS OF ANY POSSIBLE LACK OF POWER IN A CIRCUIT JUDGE AS SUCH TO ISSUE A WRIT OF HABEAS CORPUS OR TO MAKE THE ORDER APPEALED FROM, JUDGE MANTON IN THE CASE AT BAR HAD POWER TO ISSUE THE WRIT AND MAKE THE ORDER.

Even if this Court shall hold that a Circuit Judge has no power, as such, to grant a writ of habeas corpus, he may have the power, under Section 752 of the Revised Statutes, whenever he

is a Judge *of* the District Court, which a Circuit Judge now may be, just as, in the days before the Judicial Code, a District Judge was at times a Judge of the Circuit Court. A Circuit Judge is surely not functioning as a Judge of the Circuit Court of Appeals when he is sitting as a Judge of the District Court under the Expedition Act of 1903 (32 Stat., 823). A Circuit Judge has other powers than as a Judge of the Circuit Court of Appeals. He may, at times, be a Judge of the District Court, under a designation to hold a District Court by assignment pursuant to Section 18 of the Judicial Code. District Judges have no monopoly of that designation; and they, in turn, may also be, at times, Judges of the Circuit Court of Appeals.

It is respectfully submitted that the Senior Judge of the Circuit Court of Appeals in his opinion wrongly based his argument on the false assumption that the term "Circuit Judge" was exactly synonymous or interchangeable with the term "Judge of the Circuit Court of Appeals" (Record, page 1137, fol. 3413). The position of the petitioner on this point has been misconceived. The contention has been that the Circuit Judge, even if lacking power as such, had, in the case at bar, under and by virtue of the order designating him to hold the District Court, the same authority to act as a Judge *of* the District Court. But an order of a Judge of the District Court is not necessarily a District Court order. In a habeas corpus proceeding, it may be a Judge's order, pure and simple. And so Section 752 of the Revised Statutes does today relate to a Circuit Judge, whensoever he may be acting under a designation with the authority of a Judge of the District Court.

U. S. v. *Clarke,* 1 Gall., 497, 499; STORY, *J.*
Fong Yue Ting v. *U. S.,* 149 U. S., 698, 728-9, 742.

This Court has distinctly recognized that where Congress has committed jurisdiction to a Judge as a judicial tribunal, he functions through his own inherent power and not through or on behalf of the Court of which he is a member.

U. S. v. *Duell,* 172 U. S., 576, 589.

The writ granted in *Carper* v. *Fitzgerald,* 121 U. S., 87, was returnable to "the judge of our Circuit Court," and all signatures were "Hugh L. Bond, Circuit Judge" (See Transcript of Record in that case at page 2). The order of the Circuit Judge therein was expressly adjudged by this Court to be not an order of the Circuit Court.

Carper v. *Fitzgerald,* 121 U. S., 87.

The order of Circuit Judge MANTON was therefore a judge's order.

POINT V

The decisions are uniform that no appeal lay to the Circuit Court of Appeals from an order of a *Judge;* that only an order of a Court might be reviewed by appeal or writ of error.

Carper v. *Fitzgerald,* 121 U. S., 87;
In re Lennon, 150 U. S., 393;
McKnight v. *James,* 155 U. S., 685;
Lambert v. *Barrett,* 157 U. S., 697;
Ex parte Jacobi, 104 Fed., 681;
Harkrader v. *Wadley,* 172 U. S., 148.

It makes no difference, in considering this point, whether the order be regarded as that of a Circuit Judge or of a Judge designated to perform the duties of a District Judge (as was Judge MANTON, Record, page 868, fols. 2604)—it is still a Judge's order.

The making of a Judge's order in a habeas corpus proceeding is distinctly provided for in the Revised Statutes.

Section 752 provides:

> "The several justices and *judges* of the said Courts within their respective jurisdictions shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."
>
> (See also *Ex parte Milligan,* 4 Wall., 2, 110.

Section 761 provides:

> "The Court, or Justice or *Judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to *dispose* of the party as law and justice require."

It is, therefore, entirely clear that such a proceeding initiated by a writ issued by a judge should be continued before and decided by the judge issuing the same, and that there is no provision nor expectation that a proceeding, thus initiated, shall be turned into a Court proceeding, or that the final order shall be a Court order.

Carper v. *Fitzgerald*, 121 U. S., 87, was an appeal from an order of a Circuit Judge discharging a prisoner on a writ of habeas corpus. That was a proceeding before the Circuit Judge at his Chambers in Baltimore, Maryland. The petition was presented to the Judge in Baltimore, who directed the Clerk of the Circuit Court for the Eastern District of Virginia to issue a writ of habeas corpus and make it returnable before him at the United States Court House in Baltimore. The writ was accordingly issued, and made returnable

> "before the Honorable HUGH L. BOND, Judge of our Circuit Court of the United States, for the Eastern District of Virginia, sitting at the United States Court House, Baltimore, Maryland."

The record showed that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto, upon consideration of which an order of discharge was entered. At the foot of that order was the following:

> "And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said Court.—HUGH L. BOND, Circuit Judge."

From that order the jailer was allowed an appeal to this Court by the Circuit Judge, and the case was docketed in this Court as "An appeal from the Circuit Court of the United States for the Eastern

District of Virginia," but this Court refused to regard it as such.

Mr. Chief Justice WAITE delivered the opinion of the court (page 89), as follows:

> "The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under Section 752 of the Revised Statutes, before the Judge sitting as a Judge, and not as a Court. The Act of March 3, 1885, C. 353, 23 Stat., 437, gives an appeal to this Court in habeas corpus cases only from the final decision of a circuit court.
>
> "The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S., 708, adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under section 763, from the decision of a judge to the circuit court of the district, as well as under section 764, as amended by the Act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by section 765 of the Revised Statutes."

The procedure and practice followed in the instant case was exactly that adopted by Judge BOND in the case referred to, except that Judge MANTON directed the order to be filed in the office of the Clerk of the District Court (the office of Clerk of the Circuit Court having been abolished) and the Clerk of the Circuit Court of Appeals having, manifestly, nothing to do with the safe keeping of such an order. Judge MANTON's decision directed that the paper be "filed" in the office of the Clerk of the District Court and that it be "recorded" in said Court (Record page 32, fol. 94.)—the words "filed" and "recorded" being the exact ones used in *Carper* v. *Fitzgerald*.

In the instant case the Circuit Court of Appeals below gave an entirely different significance to the use of those words than this Court had done, saying, in the opinion of ROGERS, *C. J.*:

> "Whatever doubt one might otherwise entertain as to the capacity in which he was acting at the time seems to be put at rest by the order which he made and which required 'that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York' and that they 'be recorded in said court.' As a Judge of the Circuit Court of Appeals he would not have directed the papers to be filed with the Clerk of the District Court and that they be recorded in that Court, but would have filed them in the office of the Clerk of his own court and ordered them to be there recorded." (Record, fols. 3421-3423.)

In the first place the Judge was not acting as a "Judge of the Circuit Court of Appeals," but as a Circuit Judge, and for that reason it would have been manifestly improper to direct that the papers be filed in the office of the Clerk of the appellate court. Nor does a Circuit Judge function only as a judge of the Circuit Court of Appeals. As there is no longer a distinct Circuit Court, nor a Clerk of a Circuit Court, there was no place to file or record them in other than the office of the Clerk of the District Court, now fulfilling the functions of successor. The office of the Clerk of the District Court has not been limited to receiving, for record, the papers in actions and proceedings pending in the court (see 28 Stat. at L. 619-20, subdiv. 5; Copyright Law of 1831, 4 Stat. at L. 437, Section 4, Act of February 3, 1831, C. XVI; R. S. 490.)

In the opinion of the Circuit Court of Appeals below, no mention is made of the decision of this Court

in *Carper* v. *Fitzgerald* (*supra*), nor of any of the other cases at the head of this point, all of which were pressed on the attention of the Court. They were either passed by or completely misapprehended.

Neither the filing of the order nor the recording of it changed its character from that of a Judge's order, as we have seen by the case last cited.

It is proper to note in passing, that the Act known as the Habeas Corpus Act, referred to in the foregoing opinion of *Carper* v. *Fitzgerald,* has never been repealed or expressly amended in its phraseology with respect to any matter now under consideration. The annotators of the Statutes have, however, assumed from time to time to excise from or interpolate in several editions of the Revised Statutes, embracing the Habeas Corpus Act, such words as they deemed appropriate to the changes wrought by the Acts of 1891 and 1911, especially relating to the abolishment of the Circuit Court.

It is noteworthy in considering the direction and effect of the case last cited that it was an appeal from an order discharging a prisoner on a writ of habeas corpus, as in the instant case, and that it was a proceeding before a Circuit Judge at his Chambers, as in the instant case.

It is also noteworthy that that decision was arrived at nothwithstanding the rule of this Court which appeared to recognize that an appeal would lie *in some cases* or under *some* circumstances from the final decision of a judge, as well as from the final decision of a Court, discharging the writ or discharging the prisoner, as the case might be. The point of the decision was that it would not lie from an order of a Circuit Judge.

If it be urged that a Judge's order is not, or ought not to be, beyond judicial review, a ready answer

may be found in pointing out that such an order may be reviewed by appropriate procedure.

In *McKnight* v. *James*, 155 U. S., 685, a proceeding was begun by a petition in habeas corpus to the Circuit Court of Franklin County, Ohio, setting forth that the petitioner McKnight was unlawfully deprived of his liberty in the Ohio penitentiary.

Under this petition a writ of habeas corpus was granted by a Judge of the Circuit Court of Ohio, Second Judicial Circuit, and the petitioner was ordered to be produced before him in Columbus. The case was heard upon the pleadings and testimony by the Circuit Court Judge sitting in Chambers, and an order made that McKnight be remanded to the custody of the warden. Whereupon the petitioner sued out a writ of error directed to the Judge by name.

After referring to the Revised Statutes, Section 709, the Court, Mr. Justice BROWN writing (at page 687), said:

> "We held, however, in *Carper* v. *Fitzgerald*, 121 U. S., 87, that an appeal did not lie to this Court from an order of a circuit judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of habeas corpus, for the reason that the Act of March 3, 1885 (C. 353, 23 Stat., 437) gave an appeal to this Court in habeas corpus cases only from the final decision of a Circuit *Court;* and that Rule 34 did not make his decision as a judge a decision of the *court*, the purpose of that rule being to regulate appeals to the Circuit Court from the final decision of any court, justice or judge inferior to that court, as well as appeals from the final decision of such Circuit Court to the Supreme Court." (Italics ours.)

Had the lawmakers, confronted as they were by the decision in *Carper* v. *Fitzgerald*, intended to

confer jurisdiction upon the Circuit Court of Appeals to review an order of a Circuit Judge in habeas corpus, they would have said so in terms or effect by readopting, in appropriate form, the provisions of Sections 763 and 764, or have embodied them in Sections 128 and 238 of the Judicial Code, instead of making the two sections last cited the exclusive confines of appellate jurisdiction (*Cross* v. *Burke,* 146 U. S., 82).

Not only is there no longer a Circuit Court before whom an order of inferior Judge may be reviewed, but the Statute (Sec. 763, R. S.) was not amended so as to change the title of the Court therein specified to that of the Circuit Court of Appeals. The language of Section 763 remains bare and unchanged in phraseology, though deprived of force (*In re Lennon,* 150 U. S., 393; *Cross* v *Burke, supra*).

In the case of *Lambert* v. *Barrett,* 157 U. S., 697, Theodore Lambert "presented to one of the Judges of the Circuit Court of the United States for the Third Circuit at Chambers on December 28, 1894, his petition for habeas corpus."

The Circuit Judge to whom the petition was presented, upon consideration thereof and the matters therein set forth, refused to issue the writ; whereupon an appeal from the order denying the application was allowed, but was dismissed by this Court, Mr. Chief Justice FULLER saying:

> "Moreover, the order from which the appeal was taken was not a final decision of the Circuit Court of the United States for the District of New Jersey, but was an order of the Circuit Judge at Chambers, and an appeal from such an order will not lie."

In *Harkrader* v. *Wadley,* 172 U. S., 148, 162, this Court, by Mr. Justice SHIRAS, said:

"It is, indeed, true, as was decided in *Carper* v. *Fitzgerald,* 121 U. S., 87, that no appeal lies to this Court from order of a circuit judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of habeas corpus. But this record discloses that, while the original order was made at Chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the circuit court at a stated term, and therefore the case falls within *In re Pulliser,* 136 U. S., 257, 262."

Another instance where the case was heard by the Court and not by a judge is *Whitten* v. *Tomlinson,* 160 U. S., 231.

The very basis of the appeal in the instant case was that it was an order of a Circuit Judge (Vide Assignments of Error, Record, fol. 5).

The order was neither referred to in the assignment of errors as an order of the District Court, nor any error assigned presenting the order for review as an order of the District Court. The Court below, in treating and holding the order as an order of the District Court, so as to assert and to maintain its foothold of jurisdiction, and reversing it as such, proceeded to that end without any assignment of error raising any such point, and also without statutory power to review a judge's order.

The statute confers no power on the Circuit Court of Appeals to review the action of a Circuit Judge.

Even if it be granted, for the sake of the argument, that the order is the order of a Circuit Judge, regardless of his designation to perform the acts of a District Judge, and that he had no power as a Circuit Judge to issue a writ of habeas corpus, the *Circuit Court of Appeals itself had no authority whatever to review the order or decision of a Circuit Judge.* If it be assumed that there was an

unwarranted exercise of power by a Circuit Judge that would not confer a power on the Circuit Court of Appeals to review his action.

The distribution of the appellate jurisdiction of the United States Courts and the purposes that were intended to be accomplished by sections 128 and 238 of the Judicial Code, namely, to closely confine the jurisdiction of the Circuit Court of Appeals and to closely limit appeals to the Supreme Court, respectively, need not be dilated upon (*McLish* v. *Roff*, 141 U. S., 661).

When Congress by the Act of 1891, in part, and wholly in 1911, set up the new appellate court, it did not attempt to strip the circuit judges of all of their powers except to sit upon the bench of the appellate court and to be designated to sit in an inferior court; it contented itself by abolishing the Circuit Court and by specifying that the Circuit Judges, who sit in the Court of Appeals, might be designated to sit also in the District Court.

If it be argued that Congress overlooked the possible exercise of the power by a Circuit Judge, after the creation of the Circuit Court of Appeals, such an oversight cannot, by any stretch of argument, create or imply jurisdiction to review its exercise by a Court of Appeals not expressly authorized so to do.

It is axiomatic that the jurisdiction of the Circuit Court of Appeals is purely statutory. The definition by BAKER, *Circuit Judge*, of the jurisdiction of a trial Court of the United States is appropriate as well to a Circuit Court of Appeals: "A court sharply restricted both as to persons and subject matters."

These cases go upon the ground that the sole jurisdiction conferred on the appellate courts is to review the final orders of courts below by appeal

or writ of error, no jurisdiction having been conferred to review a judge's order. One reason for that, and perhaps the most applicable one, is that there is no finality in form or substance to a judge's order, and another is that in habeas corpus the discharge does not reverse the conviction.

There is a direct conflict between the Circuit Courts of Appeal for the Second and Fifth Circuits upon the appealability of the order of a Judge.

The Circuit Court of Appeals in the instant case held that:

> "The order sustaining the writ and ordering the discharge of Craig, and which the Judge ordered recorded in the District Court, and which is the order appealed from, must be regarded as made by him under his designation to hold the District Court for the Southern District of New York. And as such an appeal from that order was properly taken to this Court." Opinion ROGERS, *C. J.* (*Record*, page 1140, fol. 3422), concurred in by HOUGH, *C. J.* (*Record*, page 1160, fol. 3479).

But, in point of fact, the order followed precisely the formula laid down in *Carper* v. *Fitzgerald*, 121 U. S., 87, in which the order was held "the order of the Judge," not "a decision" or order "of the Court" in which the papers were filed or in which the Judge usually sat.

The Court below in the instant case reached its conclusion, notwithstanding that the designation embraced also "the hearing and disposition of such *ex parte* and other business as may come before *him* during said period" (*Record*, page 868, fol. 2604), and notwithstanding that the writ was granted in Chambers, the District Court not being then in session, and that the hearing was had in

Chambers (*Record,* pages 883-886, fols. 2649-2658, pages 888, 889, fols. 2662-2666).

By treating the order as an order of the Court, instead of as an order of a Judge, the Circuit Court of Appeals ignored in its opinion the effect of the holding in *Hoskins* v. *Funk,* 239 Fed. Rep., 278, by the Circuit Court of Appeals for the Fifth Circuit, that a Circuit Court of Appeals had no jurisdiction to review an order of a Judge, although that case was pressed upon the attention of the Court below.

The conflict, though ignored, exists, nevertheless, between the decisions in the two Circuit Courts of Appeal.

POINT VI.

This Court had exclusive jurisdiction, by direct appeal, to review the order discharging the petitioner, which was based upon a finding that the petitioner had been deprived of his liberty by an excess of power, involving the construction and application of the Constitution of the United States. The assumption of jurisdiction by the Circuit Court of Appeals warrants and requires the intervention of this Court.

The petitioner claimed that he had been deprived of his liberty without due process of law because, in the contempt proceedings, the Court had proceeded without any foundation of jurisdiction, and in excess of its powers, being delimited by the terms of a Federal Statute to punishing acts tending to obstruct the administration of justice in a pending cause, when in fact there was no matter pending calling for judicial determination, nothing *sub judice.*

The petition for writ of habeas corpus set forth (Record, fol. 126):

> "Your petitioner further alleges that said *order and commitment were and are void* and were made *without any jurisdiction* in the Court or the said Judge to make, file or enter the same and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and without due process of law and, since being taken into custody by said Marshal, as aforesaid, has been continuously so deprived of his liberty, in violation of the Constitution of the United States, and especially the Fifth Article of the amend-

ments thereof, and in violation of the laws of the United States."

Judge MANTON in his opinion devoted himself principally to the point of absence of jurisdiction and the consequent excess of power, citing *Ex parte Hudgings,* 249 U. S., 378; *Ex parte Royall,* 117 U. S., 241; *Ex parte Lange,* 85 U. S. (18 Wall), 163; *New York* v. *Eno,* 155 U. S., 89; *In re Loney,* 134 U. S., 372; *Ex parte Siebold,* 100 U. S., 371; *Ex parte Parks,* 93 U. S., 18.

The construction or application of the Federal Constitution was thus involved. This Court, therefore, had exclusive jurisdiction of any appeal. (*Judicial Code,* Sec. 238; *Raton Waterworks Co.* v. *City of Raton,* 249 U. S., 552; *Union & Planters Bank* v. *City of Memphis,* 189 U. S., 71; *Carolina Glass Co.* v. *State of South Carolina,* 240 U. S., 305, 318; *Horn* v. *Mitchell,* 243 U. S., 247; *Greene* v. *Louisville & I. R. R. Co.,* 244 U. S., 499; *Pierce* v. *Creecy,* 210 U. S., 387; *Horner* v. *United States,* 143 U. S., 207; *Collins* v. *Board of Control,* 219 Fed., 885; *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.,* 212 Fed., 156; *Grammer* v. *Fenton,* C. C. A., Eighth Circuit, 268 Fed., 943.)

POINT VII.

If the Circuit Court of Appeals had no jurisdiction to review the order of a Circuit Judge, its determination should be reversed regardless of the question as to whether the District Court acted in excess of its powers, and regardless, also, of whether Habeas Corpus was the proper remedy, leaving those questions to be reviewed by appropriate procedure.

If this Court reaches the conclusion that the Circuit Court of Appeals unwarrantedly assumed jurisdiction to review an order of a Circuit Judge; that no such jurisdiction has been conferred by statute on the Circuit Court of Appeals, the proper course to pursue is to reverse the determination of that Court, with a direction to dismiss the appeal (as was done in *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 *U. S.*, 280, 292), without inquiring whether Judge MAYER exceeded his jurisdiction in adjudging the petitioner in contempt, and without inquiring whether habeas corpus was the proper remedy and was properly exercised in this case. In other words, even though the petitioner was rightfully convicted, and even though he were wrongfully released under habeas corpus, if the Circuit Court of Appeals had no jurisdictional power to review either of those questions, they must be presented by appropriate methods of review before the appropriate forum.

POINT VIII.

Habeas Corpus was the proper and effective remedy for excess of power or lack of jurisdiction in the commitment for asserted contempt.

Ex parte Hudgings, 249 U. S., 378;
In re Watts, 190 U. S., 1;
Cuyler v. *Atlantic & N. C. R. Co.* (*in re Daniels*), 131 Fed., 95;
In re Reese, 98 Fed., 984;
Ex parte Dock Bridges, 2 Woods, 428;
Ex parte Lange, 18 Wall, 163;
Ex parte Siebold, 100 U. S., 371;
Ex parte Fisk, 113 U. S., 713;
In re Ayers, 123 U. S., 443;
Hans Nielsen, Petitioner, 131 U. S., 176;
Cuddy, Petitioner, 131 U. S., 280, 283;
In re Mayfield, 141 U. S., 107;
Ex parte Robinson, 144 Fed., 835.

A single Judge of a lower court has the same power as the Supreme Court to issue a writ of habeas corpus. *Ex parte Milligan,* 4 Wall., 2, 110; R. S., Sects. 751, 752.

"And although it may appear unseemly that a prisoner after conviction * * * should be set at liberty by a single Judge on habeas corpus there seems to be no escape from the law." Mr. Justice BRADLEY, sitting as Circuit Judge in *Ex parte Dock Bridges,* 2 Woods, 428, 432; referred to with approval in *Ex parte Royall,* 117 U. S., 241, at page 253.

There has been no change in the law in that respect.

That the Congress has liberalized the common law scope of habeas corpus is frequently overlooked by Courts and counsel. In the instant case

the Court below cited and quoted from a number of cases under the common law, and others, notably *Ex parte Tobias Watkins,* 3 Peters 193, and *Ex parte Kearney,* 7 Wheaton, 38, decided before the Act of 1831, defining the power of Federal Courts in the punishment of contempt and also prior to the Habeas Corpus Act of 1867, which latter expressly provided that:

> "The Court or Justice or Judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require." (R. S., Sec. 761.)

A prisoner may have a judicial inquiry in a Court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to *test the jurisdiction* of the Court to proceed to judgment against him. *Frank* v. *Mangum,* 237 U. S., 309, at p. 331.

In *Ex parte Lange,* 18 Wall, 163, 166, the Court declared that its authority

> "to issue this writ and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer open to question."

In *Ex parte Siebold,* 100 U. S., 371, the Court not only asserted its right by habeas corpus to enquire as to (page 376)

> "clear and manifest *want of criminality in* the matter charged, such as in effect to render the proceedings void";

but that (page 377)

> "personal liberty is of so great moment in the eye of the law that the judgment of an

> inferior court affecting it is not deemed so conclusive, but that * * * the question of the *court's authority* to try and imprison the party *may be reviewed* on habeas corpus, by a superior court or judge having authority to award the writ." (Italics ours.)

The addition of the words "by a Superior Court, or judge having authority to award the writ," is most significant in its recognition that a single judge, under the statute, has the power and authority that the Supreme Court itself has to award the writ.

Mr. Justice BRADLEY in *Ex parte Siebold, supra,* quoted from Bacon's Abridgement as follows:

> "'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the Court are (*sic*) to discharge.'

This was also quoted in *Ex parte Parks,* 93 U. S., 18, 22, and in *Hans Nielsen, Petitioner,* 131 U. S., 176.

Again in *Matter of Gregory,* 219 U. S., 210, at page 217, this Court recognized as an appropriate ground for the application of the writ "such an obvious and palpable *want of criminality* that the judicial judgment cannot be said to have been invoked."

In *Ex Parte Parks,* 93 U. S., 18, the Court declared a writ of habeas corpus to be appropriate and effective to enquire sufficiently to determine that (page 23)

> "no act beyond the powers conferred on it"

had been committed by the lower court, and that

> "if it (this Court) finds that the Court below has transcended its powers"

relief will be granted by this means.

In *Cuddy, Petitioner,* 131 U. S., 280, 286, which was an appeal from an order of the Circuit Court refusing a petition for a writ of habeas corpus, this Court said:

> "The judgment being attacked collaterally, and the record disclosing a case of contempt, *and not showing one beyond the jurisdiction of the court,* it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, *about which the record is silent, may not be overcome by evidence.* On the contrary, if the appellant had alleged such facts as indicated that *the misbehavior* with which he was charged *was not such as,* under Section 725 of the Revised Statutes, *made him liable* to fine or imprisonment, at the discretion of the Court, he would have been entitled to the writ, and, *upon proving such facts,* to have been discharged. *Such evidence would not have contradicted the record."* (Italics ours.)

The instant case came directly within the proviso above stated.

In *Ex Parte Reed,* 100 U. S., 13, 23, Mr. Justice SWAYNE said:

> "We do not overlook the point that there must be *jurisdiction to give the judgment rendered,* as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. *Every act of a court beyond its jurisdiction is void."* (Italics ours.)

Citing *Cornett* v. *Williams,* 20 Wall, 226; *Windsor* v. *McVeigh,* 93 U. S., 274.

The Information now before the Court alleged that certain *proceedings* "have been pending in this Court" (Record, pp. 44-45, fols. 131-134), and further that "The said letter, as well as the publication thereof as aforesaid, each tended and was calculated and intended by the defendant to influence this Court in its consideration of *suits* and *proceedings* aforesaid, pending when said letter was written, delivered," etc. (Record, p. 59, fols. 176-177). It did not allege that any *subject matter was pending determination.*

The conviction or judgment was expressly limited to a finding that the petitioner was "guilty of contempt of Court as charged in the Information, *in respect of* the matters set forth in paragraphs numbered 1, 2, 3 and 4 of the Information herein (fol. 2515) which had all occurred nine months before the alleged contempt (vide Information, Record, pp. 56-58, fols. 168-174).

There was no finding that any *subject-matter* was pending *sub judice*, or imminent.

On the other hand, the Petition for the writ expressly alleged (Record, p. 38, fols. 112-113):

> "a. That neither on the 6th nor the 7th day of October, 1919, *was there pending sub judice* before said District Judge or said Court *any matter or judicial determination* in any suit or proceeding mentioned in the Information or in any suit or proceeding consolidated with any or either of such suits and proceeding.
>
> "b. That all orders and judicial determinations which were referred to in the letter of October 6, 1919, from your petitioner to Lewis Nixon, Public Service Commissioner, set forth in the said Information, *had been previously made and concluded* and that no hearing was pending, awaiting determination, upon any of said orders or judicial determinations or the subject matter thereof."

And the Return to the writ admitted, as we have shown elsewhere (Record, pp. 842-843, fols. 2526-2527):

> "IV. Still insisting that your Honor is without authority to issue a writ of habeas corpus and that the petition for the writ herein is insufficient in law, and without waiver thereof, this respondent says: On October 6, 1919, *there was not pending awaiting decision any order or judicial determination* mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

The petitioner's application for the writ came, therefore, directly and exactly within the case put in *Cuddy, Petitioner* (*supra*), and *In re Mayfield*, 141 U. S., 107, 116: (a) The "record is silent" as to any subject-matter pending *sub judice*. (2) The petition alleged that there was in fact none such pending. (3) The return admitted that "there was not pending awaiting decision any order or judicial determination."

The petitioner thus met not only every requisite mentioned in *Cuddy, Petitioner, supra,* and *In re Mayfield, supra,* but in the most satisfactory form showed that "new" fact or element on his application for the writ which HOUGH, *C. J.*, in his concurring opinion in the instant case said had not been shown (Record, fol. 3482). The allegation in the Petition and the *express admission* in the Return were at least tantamount to the proof allowed and provided for by the Habeas Corpus Act (R. S., Sec. 761), or to the legal effect of a demurrer in admitting the facts as in *Moore* v. *Dempsey*, 261 U. S., 86, and in *Hans Nielsen, Petitioner*, 131 U. S., 176, 183.

In *Hans Nielsen, petitioner,* 131 U. S., 176, 184, the Court said there must be not merely

"jurisdiction of the cause,"

but

"authority or power to condemn the prisoner"

lacking which

"a party is entitled to a habeas corpus."

and concluded with the expression: "If we have seemed to hold the contrary in any case it has been from inadvertence."

In *Ex Parte Bigelow,* 113 U. S., 328, 330, the Court said:

> "It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action, when erroneous, a nullity."

This expression was repeated in *Re Eckort,* 166 U. S., 481.

This thought respecting jurisdiction is also tersely expressed by Mr. Justice HOLMES with respect to a controversy which concerned a subject limited by Federal Law (as is punishment for contempt).

> "The jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the Court" (*Lamar v. United States,* 240 U. S., 60, 64).

In *In re Mayfield,* 141 U. S., 107, 116, the Court said:

> "This Court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record."

In *In re Belt, petitioner,* 159 U. S., 95, the Court said (at p. 100):

> "The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is *without jurisdiction,* and that it cannot be used to correct errors. Ordinarily the writ will not lie where there is a remedy by a writ of error or appeal; but in rare and exceptional cases it *may be issued,* although such remedy exists." (Italics ours.)

In *In re Watts & Sachs,* 190 U. S., 1, at p. 35, on habeas corpus and certiorari to review a contempt commitment this court discharged the petitioners upon the ground that *"there was no legal evidence* to sustain these convictions for contempt."

In *Hyde* v. *Shine,* 199 U. S., 62, at p. 84, this Court recognized that on habeas corpus "if there is an entire lack of evidence to support the accusation the Court may order his discharge."

This Court, in discharging a prisoner, said in *Ex parte Hudgings,* 249 U. S., 378, 379:

> "The grounds for discharge were, that the Court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible of being treated as a contempt, the action of the Court was arbitrary, beyond the limits of any discretion possessed, and violative of due process of law under the Fifth Amendment."

The decision in the *Hudgings* case, *supra,* we urged below, and again urge, as determinative of the two main points involved; (a) that there was no contempt because there was no obstruction to the administration of justice, and (b) that the relief against imprisonment is by habeas corpus, where the element of obstruction is lacking

That was an original application to this Court

for a writ of habeas corpus to relieve against a contempt commitment for asserted false testimony of a witness. The application to the Court did not differ in kind from an application to a judge of a lower court, as we have seen.

So we start, in considering the *Hudgings* case, with the comprehension that Judge MANTON, either in his capacity as a circuit judge or under his designation to perform the duties of a district judge, had the same power as the Supreme Court to issue and sustain the writ.

The only difference in the procedure was that in the instant case "testimony" was taken, as provided in the Habeas Corpus Act (R. S., Sec. 761), so as to present the whole record, while in the *Hudgings* case that was done by setting forth the proceedings in the petition, "and a transcript of the stenographer's notes showing what transpired in the Court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record" (p. 380). We may say, parenthetically, that that was the course pursued in *Cuddy, Petitioner,* 131 U. S., 280, 281.

What the petitioner asserted, in the *Hudgings* case and the Court understood him to assert, as a foothold for relief on habeas corpus, was (a) "that the Court had *exceeded its jurisdiction* by punishing as a contempt (b) *an act* which it had *no power to so punish,* and (c) that the action of the Court was arbitrary, beyond discretion and violative of due process. A clear appreciation of these points, separately, disposes, we think, of the distinctions which were suggested by the Court below in the instant case. Note the use of the expressions in the *Hudgings* case, carried throughout the opinion "exceeded" and "excess" in relation to jurisdiction and power, which are asserted here in challenging jurisdiction. The reason that those

terms are appropriate is because its jurisdiction is a *limited* one, since the Act of 1831; now embodied in the Judicial Code, §268, quoted at p. 18, *supra*, hence the expressions "excess of jurisdiction" and "excess of power" are peculiarly appropriate. In discussions of constructive contempt the statutorially limited jurisdiction of the United States courts is all too frequently lost sight of, as it was below, in the citation of English and state court cases.

Next there should be noted that Mr. Chief Justice WHITE, in the *Hudgings* case, spoke of "an act which it had no power to so punish," and later on he defined what was such an act and the incidence of power to punish.

There is no plenary power to punish an act alleged to be contemptuous; it must fall within the statutory *proviso*. A proceeding to punish for alleged contempt is *sui generis* in the mode of accusation, the method of inquiry and even in the mode of punishment (*Creekmore* v. *United States*, 237 Fed. Rep., 743; *Merchants Stock & G. Co.* v. *Board of Trade*, 201 Fed., 20). This was also referred to later on in the opinion in the *Hudgings* case (at p. 383). Because it is *sui generis*, mere allegation is not sufficient. An information may be useful to establish the confines of the inquiry, but it is not provided for in any statute relating to contempt, nor by any criminal procedure on the subject. It does not give jurisdiction. It is not like an indictment, nor even like an Information touching a statutory offense or a common law crime. It is not accompanied by process. The order to show cause which usually accompanies it, as in this case, has no jurisdictional force over a person not a party to a pending proceeding. An *act* which the Court has *power* to punish is the requisite of its juris-

diction, as is clearly pointed out by Mr. Chief Justice WHITE, in the *Hudgings* case.

The Court proceeded (at pp. 379 and 380) to state the duty of the Court to consider the case as within the exception to the rule established by this Court to justify "resort to the original jurisdiction of this Court." That exception has nothing to do with an application to a lower court or judge where such a rule does not obtain. We make mention of it only because of the suggestion in the opinion of the court below that "what was done in the *Hudgings* case was done at least by a court empowered to review and set aside erroneous judgments in appropriate proceedings." (Record, p. 1153, fol. 3458.) Palpably this Court was exercising its original jurisdiction, not its powers of review.

Continuing our analysis of the *Hudgings* case, *supra*, the opinion then proceeded to state the manner in which the alleged contempt occurred, including the following (at p. 381):

> "Finally the Court interrupted the examination by saying:
>
> " 'This witness is going to be committed for contempt of court. The Court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife * * *
>
> " 'And it becomes the plain duty of the Court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the Court to explain to you that the answer, "I do not remember of ever having seen him write," is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, "I do not remember".' "

"In the same direction the Court said:

"'I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this Court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it.'"

The Petition in the record of that case (pp. 25, 26) contained a further transcript of what took place:

"The Court: Tell the Court whether you care to *take any further time on this matter,* do you?

"The Witness: My time is your time.

"The Court: I suggest that you might *confer with counsel.*

"The Witness: *No, sir,* my answers will be exactly *as they have been.*

"The Court: *Very well. You are adjudged to be in contempt* of this Court and you are ordered to be committed to jail forthwith. Mr. Clerk, you prepare the commitments. You are in the custody of the marshal from now on."

No reference is made in the opinion of the Court below in the instant case to the above quotation from the record in the *Hudgings* case, which was abstracted at length in our printed brief before the Court below. On the other hand the Court below said: "In the *Hudgings* case, *without* proof of guilt, without evidence, without any hearing, the Court forthwith ordered the imprisonment," etc. (Record, p. 1152, fol. 3456.)

It will be observed that (a) an opportunity to confer with counsel and for purging was allowed, such as it was, and (b) that the Court had concluded that the act did obstruct justice, though there was no written finding to that effect. Slight safeguards for the liberty of the citizen, it is true, but sufficient to require this Court to determine the main question of the "erroneous doctrine" of the power of the Court.

This Court stated the question as follows in the *Hudgings* case:

> "Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury is the test we must here apply" (p. 382).

The procedural points and the punishment were passed by in the determination of the great principle involved. That appears in the language of the opinion (at p. 383):

> "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to *modes of accusation* and *methods of trial* generally safeguarding the rights of the citizen." (Italics ours).

Had the Court intended to rest its decision either on the mode of accusation or the method of trial, the language quoted would have been quite beside the mark.

The opinion proceeds:

> "This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and *only purpose* is to secure judicial authority from *obstruction in the performance of its duties* to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." (Italics ours). (Citing *Toledo Newspaper Co.* v. *United States,* 247 U. S., 402; *Marshall* v. *Gordon,* 243 U. S., 521.)
>
> "An obstruction to the *performance* of judicial duty *resulting from* an act done in the presence of the Court is, then, *the characteristic* upon which *the power* to punish for contempt *must rest.*"

We have, then, (1) the purpose—the only purpose; (2) the characteristic act, and (3) the result, on which (4) the power must rest.

"Obstruction"—is the monumental thing.

We turn now to the point of next importance, stated at the head of this point: The exertion of the power, and means of enquiring into it by habeas corpus.

The Court, following on directly from the language above quoted, said (at p. 383):

> "This being true, it follows that the *presence* of that element *must clearly be shown* in every case where the power to punish for contempt is *exerted*—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty."

In the use of the expression "the presence of that element must clearly be shown" the Court doubtless had in mind that when acting under the Federal Contempt Statute the Court is exercising a *limited jurisdiction* which may always be challenged, not the general jurisdiction of a superior court.

The predicate, upon which the Court granted the writ and discharged the petitioner, was that when a commitment is attacked upon the ground "that the court had exceeded its jurisdiction," the *presence, i.e.,* the *existence* of the element of an obstruction to the performance of judicial duty *must clearly be shown,* where the power has been exerted. Not merely that it must be charged, generally or indefinitely, but must be shown to exist.

This is made plainer still by the next paragraph of the opinion (at p. 384):

> *"Testing the power to make the commitment* which is under consideration in this case by the principles thus stated, we are of opinion that the *commitment was void for excess of power*—a conclusion irresistibly following from the fact that the *punishment was imposed for* the supposed perjury alone without reference to any *circumstance or condition* giving to it an obstructive effect."

The conclusion of the Court that the punishment was imposed "without any reference to any circumstance or condition giving to it an obstructive effect" was directly in the face of the pronouncement of the Judge below, which we have quoted from the report of the case at page 381:

> "I am not going to allow you to obstruct the course of justice here."

That was passed by to ascertain whether the presence or existence of an obstructive act was "clearly shown."

Far from being clearly shown in the instant case, there is an express admission in the Return, as we have seen (Record, fols. 2526-2528) that:

> "On October 6, 1919, there was not pending awaiting decision any order or judicial determination mentioned in the letter of that date from the petitioner to Lewis Nixon, set forth in the Information, but the same was still within the control of the District Court of the United States for the Southern District of New York and subject to change."

With that admission in the Return the instant case is stronger for the petitioner than was the *Hudgings* case for the petitioner there.

Does the all-important expression in the *Hudgings* case that we have quoted, with the context (*supra*), "Testing the power to make the commitment," mean less or other than that it is the office

of this great writ, and of the Court or Judge issuing it, to test the power, by that means and in that way, to make the commitment, by looking into the record deep enough to ascertain whether the presence—not merely the charge or opinion—of an obstruction to judicial duty was clearly shown.

And why should that not be so? A citizen, in this case a public official who is presumably trying to do his duty—even if mistakenly—in the same way as the Judge is trying to do his, is haled into court upon an assertion that he has obstructed the Judge in the performance of his judicial duty; the charge is directed by the same Judge and tried before the same Judge, against the protest of the citizen that another Judge be designated to hear the proceeding, and he is committed for a long period. Why should not some other judge or set of judges forthwith test the commitment by enquiring whether the presence or existence of the act of obstruction was clearly shown, and not merely that the accusing Judge, who was also the Trial Judge, thought that an obstruction was intended. If all of the ordinary modes of accusation and methods of trial are laid aside to preserve the integrity of the administration of justice, ought not the presence or existence of the obstruction be required to "clearly be shown" in a like summary way before another judge or judges, in "every case," as Chief Justice WHITE used those terms?

The principal reason why an inquiry in a contempt case into the jurisdiction is proper by habeas corpus proceedings, is that the jurisdiction of the United States Courts, since the act of 1831, following the Peck impeachment and now embodied in the Judicial Code, is limited in every case upon a proviso appearing on the very face of the Statute. While, therefore, there is inherent power in the United States Courts to punish for contempts, it is

a limited power, and for that reason may be examined into in "every case."

The Court below said: "In the present case sentence was imposed at the end of legal proceedings of a thorough and deliberate nature," etc. That the legal procedure has been deliberate and thorough has nothing to do with the principle involved. Analogy or lack of analogy does not depend on speed or brusqueness.

Judge ROGERS in the Court below said that the *Hudgings* case was of a "remarkable and exceptional character. The case stands by itself and is properly regarded as *sui generis*" (fol. 3455), and the learned prosecuting attorney said that "That case was entirely *sui generis*. It stands alone."

The term *sui generis* is the one that is usually applied to all indirect contempt proceedings. It certainly demonstrated that, without the great power of the writ, the petitioner might rot in jail without redress—but regardless of its impelling facts, the case is most notable for the clarity of its reasoning on the essential jurisdictional elements of the contempt statute, the only pronouncement of this Court on that subject in many generations.

The *Hudgings* case did not rest on lack of deliberateness, or thoroughness, or exceptional expedition. We have already pointed out that, in the opinion in that case, emphasis was laid upon the fact that the ordinary methods of accusation and trial might be dispensed with in contempt cases.

The concluding comment of the Court below in the instant case (Record, fols. 3460-3461):

> "We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ of error but must be limited to jurisdictional questions,"

shows a total disregard of the main attack made by us upon the conviction, which is upon jurisdictional grounds; our position is and has been always that the ordinary procedure in a contempt case where the Court lacks jurisdiction, or has exerted "excess of power," is to proceed by a writ of habeas corpus and not by writ of error.

In *Ex parte Lange,* 18 Wall, 163, 165-178, this Court said:

> "On consideration of the petition, which was filed in this case at a former day, the Court was of opinion that the facts therein recited very fairly raised the question whether the Circuit Court, in the sentence which it had pronounced, and under which the prisoner was held, had not exceeded its powers. It therefore directed the writ to issue, accompanied also by a writ of certiorari, to bring before this Court the proceedings in the Circuit Court under which the petitioner was restrained of his liberty. The authority of this Court in such case, under the Constitution of the United States, and the 14th section of the Judiciary Act of 1789, to issue this writ, and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that Court has exceeded its authority, is no longer open to question. The cases cited in the note below (*Hamilton's case,* 3 Dall., 17; *Burford's case,* 3 Cranch, 448; *Ex parte Bollman,* 4 Cranch, 75; *Ex parte Watkins,* 3 Pet., 193; S. C., 7 Pet. 568; *Ex parte Metzger,* 5 How., 176; *Ex parte Kaine,* 14 How., 103; *Ex parte Wells,* 18 How., 307; *Ex parte Milligan,* 4 Wall., 2; *Ex parte McCardle,* 6 Wall., 318; S. C., 7 Wall., 506; *Ex parte Yerger,* 8 Wall., 85) will, when examined, establish this proposition as far as judicial decision can establish it.
>
> "Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of habeas corpus or otherwise, we pro-

ceed to examine the case as disclosed by the record of the Circuit Court and the return of the marshal, in whose custody the prisoner is found, *to ascertain whether it shows that the Court below had any power to render the judgment by which the prisoner is held.*

* * * * * * * * *

"There is no more sacred duty of a Court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

In *Hans Nielsen, Petitioner,* 131 U. S., 176, at p. 184, Mr. Justice BRADLEY said, delivering the opinion of the Court reversing, on appeal, a final order refusing to issue a habeas corpus, and directing that a writ issue:

"A party is entitled to a habeas corpus, *not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.* As said by Chief Baron GILBERT, in a passage quoted in *ex parte Parks,* 93 U. S., 18, 22: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court (*sic*) are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord HALE laid down the same doctrine in almost the same words (2 Hale's Pleas of the Crown, 144). *And why should not such a rule prevail in favorem*

liberatis? If we have seemed to hold the contrary in any case, it has been from inadvertence."

This case is most valuable, for there could be no doubt that the Court had jurisdiction of the cause, viz., the crime of unlawful cohabitation for which he was convicted and punished, but the Court sustained the writ upon the ground that the Court below had no constitutional authority or power to condemn the prisoner, for the reason that the crime of adultery with which he was charged, although on different dates, was included in the crime of unlawful cohabitation. For that purpose the Court went behind the record and looked into the facts, saying in conclusion (pp. 190-191):

> "The Court was without authority to give judgment and sentence in the latter case, and should have vacated and set aside the same when the petitioner applied for a habeas corpus."

In the dissenting opinion of LEARNED HAND, *J.*, below he says: "With the exception of *Ex parte Kearney* (7 Wheat. 78) I have found no case in the Supreme Court which refused to consider the merits, at least, to determine whether the offense was in fact within the Statute of Contempts" (Record, p. 1168, fols. 3494 and 3495) and he goes on to say: "Moreover, the case was decided before 1831, when the common law powers of the Court were first limited by the proviso of Section 268" (Record, page 1168, fol. 3496). And still further: "The cases are clear authority for the proposition that habeas corpus will, at times anyway, examine whether the underlying facts necessary to the commitment exist" (Record, page 1170, fol. 3500).

The trend of the decisions of this Court has shown a steady broadening in the conception of the elements of jurisdiction, when questioned col-

laterally whether by habeas corpus or otherwise. The rigid definition of jurisdiction in *Ex parte Watkins*, 3 Peters, 193, and *Ex parte Kearney*, 7 Wheaton, 38, where the only elements considered were parties and ostensible subject matter, was expanded in the opinion of Mr. Justice SWAYNE in *Cornett* v. *Williams*, 20 Wall., 250, where he spoke of "within the *power* of that jurisdiction, when collaterally questioned" and in the opinion of Mr. Justice FIELD in *Windsor* v. *McVeigh*, 93 U. S., 274, where he used the expression "cannot then *transcend* the power conferred by law." In *Ex parte Parks*, 93 U. S., 18, we find the same thought expressed in a habeas corpus proceeding: "if it (this Court) finds that the Court below has *transcended* its powers" relief would be granted. In *Ex parte Reed*, 100 U. S., 13, 23, we find Mr. Justice SWAYNE again referring to "jurisdiction *to give the judgment rendered*" and "every act of a court beyond its jurisdiction is void." In *Cuddy, Petitioner*, 131 U. S., 280, 286, the expression is "beyond the jurisdiction." In *Hans Nielsen, Petitioner*, 131 U. S., 176, 184, the Court said there must be not only jurisdiction of the cause but "authority or power to condemn the prisoner." In *Matter of Gregory*, 219 U. S., 210, the Court assumes a case where "the judicial judgment cannot be said to have been invoked." These reached the ultimate phrase in the succinct words in *Ex parte Hudgings* (*supra*), "excess of power."

POINT IX

The disregard, by the Court below, of the statutory proviso of punishment for obstructive misbehavior, only, and the limitations sought to be placed by the Court below on the scope of the writ of habeas corpus are not in accord with the rulings of this Court.

The Circuit Court of Appeals below, in considering the subject matter of contempt in its opinion, cited and relied upon the common law rule as laid down in the old cases such as *Brass Crosby, Lord Mayor of London,* 3 Wilson, 188, and under our former contempt statute, such as *Ex parte Watkins,* 3 Peters, 193, and *Ex parte Kearney,* 7 Wheat, 38, and gave no effect whatever to the limitation of the jurisdiction as now provided in the Statute. Judge ROGERS quoted from *Ex parte Robinson,* 19 Wall, 505, 510, as follows (*Record,* page 1156, fols. 3464-3465):

> "The moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

But he omitted the most significant part of the paragraph from which the quotation was made, the next sentence, viz.:

> "But the power has been limited and defined by the Act of Congress of March 2, 1831."

The learned prosecuting attorney had made the same omission in quotation, and we had called attention to the omission in our printed brief before the Court, but the Court took no notice of it in its opinion.

Ex parte Kearney (*supra*) and *Ex parte Watkins*

(*supra*) were decided before the Act of 1831 (now carried into the Judicial Code as §268) which introduced the proviso of obstructive misbehavior as the basis of contempt, and while the opinions were those of great judges, they are no longer applicable, we submit. If those cases are to be regarded as controlling what effect is to be given not only to the proviso but to the broadened scope of the habeas corpus act of 1867 (vide pp. 90-110, *supra*).

The expression that a writ of habeas corpus cannot be used to perform the functions of a writ of error, has no application to such matters as relate to the jurisdictional power of the Court, especially in view of the liberalizing tendency in the scope of habeas corpus since the enactment of the Habeas Corpus Act of 1867.

We freely concede that the writ of habeas corpus may *not* be employed as an anticipatory writ of error, such as was discountenanced in *Henry* v. *Henkel*, 235 U. S., 219; *Rumely* v. *McCarthy*, 250 U. S., 283, and similar cases. But generally the rule of procedure for which such cases stand is quite beside the right to attack by writ for lack of jurisdiction or excess of power.

In fact one of the exceptions to the general rule as established in *Henry* v. *Henkel, supra*, is "(5) the judgment or order under which he is held is a nullity because in excess of the power of the Court."

The two cases chiefly relied upon by the learned prosecuting attorney on the argument below, *Ex parte Parks*, 93 U. S., 18, and *Ex parte Yarbrough*, 110 U. S., 651, recognize the principles for which we contend.

In *Ex parte Parks, supra*, which was a petition for habeas corpus, Mr. Justice BRADLEY, delivering the opinion of this Court, said:

> ' 'From this review of the law it is apparent, therefore, as before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the Court below had jurisdiction of the offense, *and did no act beyond the powers conferred upon it.* The Court will look into the proceedings so far as to determine this question. If it finds that the Court below has *transcended its powers,* it will grant the writ and discharge the prisoner, even after judgment." Citing *Ex parte Kearney,* 7 Wheat., 38; *Ex parte Wells,* 18 How., 307; *Ex parte Lange,* 18 Wall., 163. (Italics ours.)

The proper application and limitation of *Ex parte Parks,* cited by the Government, is expressly pointed out in *Ex parte Siebold,* 100 U. S., 375, in the following language: "This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange,* 18 Wall., 163, and *Ex parte Parks,* 93 U. S., 18."

In *Ex parte: Jasper Yarbrough,* 110 U. S. 651-667; decided Mar. 3, 1884, the other case much relied upon by the prosecuting attorney, this Court likewise recognized the principle for which we contend.

Mr. Justice MILLER delivered the opinion of the Court:

> "That this Court has no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any Court of the United States in regard to a matter *wholly beyond or without the jurisdiction of that Court,* it is not only within the authority of the Supreme Court but it is its

duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter *of which such a Court had no jurisdiction, to discharge a prisoner from confinement.*" Citing *Ex parte Kearney,* 7 Wheat., 38; *Ex parte Wells,* 18 How., 307; *Ex parte Lange,* 18 Wall., 163; *Ex parte Parks,* 93 U. S., 18. (Italics ours.)

The case of *United States* v. *Pridgeon,* 153 U. S., 49, 51, is frequently cited as indicating a limitation upon the powers of the Court to examine into the merits on habeas corpus, but rightly understood it should not be so considered. The question there arose on a certificate from the United States Circuit Court of Appeals for the Sixth Circuit, of questions for the decision of the Supreme Court in a proceeding by habeas corpus, issued by the United States Circuit Court for the Southern District of Ohio, Eastern Division, upon which that Court discharged the petitioner, Sidney S. Pridgeon, from confinement under a conviction, in the District Court, for horse stealing, and from which decision the United States appealed to the Circuit Court of Appeals.

Mr. Justice JACKSON delivered the opinion of the Court:

"Under a writ of habeas corpus the inquiry is addressed not to errors but to the question whether the proceedings and the judgment rendered therein, are for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge.

* * * * * * * * *

"We have not deemed it necessary to review or to attempt to reconcile the authorities on the question for the reason that while all concede that neither irregularities nor error, so

far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the functions of a writ of error in relation to proceedings of a Court within its jurisdiction—*they differ widely as to what constitute error, and what should be regarded as rendering the judgment or proceedings void*" (Italics ours).

That differing of views continues to this day, with some elucidation. If there be two views in the instant case let us heed the admonition of Justice MILLER in *Ex parte Lange*, 85 U. S., 18 Wall., 163; "In such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

In considering the expressions in some of the text books that were published before the decision of the Court in *Ex parte Hudgings*, 249 U. S., 378, it should be borne in mind that that case expresses more fully and more definitely the right to and the grounds of the issuance and office of a writ of habeas corpus in contempt cases than many of the earlier cases.

In Foster's Federal Practice, 6th Edition, recently published, the *Hudgings* case is frequently cited and its broadening effect is plainly shown.

A contempt proceeding has frequently been described as *"sui generis"* (*Creekmore* v. *United States*, 237 Fed. Rep., 743), and many of its anomalies and anachronisms are brushed aside by resort to that phrase. We do know that it is described, and well described, as "summary," lacking many of the safeguards of the liberty of the citizen (*Merchants Stock & G. Co.* v. *Board of Trade*, 201 Fed., 20; *Ex parte Hudgings, supra*). To remedy the excess of power in such a proceeding is there anything more appropriate than the "summary" proceeding provided by the Habeas Corpus Act, "to

dispose of the party as law and justice require?" (R. S. 761).

We have referred to the contentions of the Government with respect to the *Hudgings* case in our review of that case (*supra*).

Even though the only question that the Court on habeas corpus can look into is one of jurisdiction, broadly considered, the cases show that the Court may look into the facts upon which the conviction was based, to the extent that it affects the jurisdiction of the Court which assumed to make the adjudication. That is the very thing that was done in *re Mayfield,* 141 U. S., 107, 116, where this Court looked into the record and also the concessions *dehors* the original record, for the purpose of ascertaining whether the alleged crime for which the petitioner was convicted was in reality a crime.

The scope of the writ, as applicable to the case at bar, has been indicated by this Court:

> "If the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under Section 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the Court, he would have been entitled to the writ, and, *upon proving such facts, to have been discharged. Such evidence would not have contradicted the record.*"
>
> *Cuddy, Petitioner,* 131 U. S., 280, 286.

The petition for the writ in the case at bar alleged the facts which indicated that the misbehavior with which petitioner was charged was not such as to be punishable by imprisonment. (Record, pages 38-42, fols. 112-124.)

As in the *Hudgings* case (*supra*), all the testimony and proceedings in the District Court on the contempt trial was pleaded and proved (Rec-

ord, page 880, fol. 2639). That method of procedure is expressly sanctioned by the Habeas Corpus Act.

It is unquestionably true that the Court may not, on a trial on habeas corpus, pass upon any *controverted* question of fact in the record of the contempt proceeding. The exact language of the command of the Habeas Corpus Act directs a summary hearing *"so that thereby the material facts may be ascertained"* and the matter disposed of *"as law and justice require"* (U. S. Rev. Stat. §§754, 757-761, *Cuddy, Petitioner,* 131 U. S., 280). It contemplates the taking of new evidence, if any such be offered, as was done in the instant proceeding, and such testimony is admissible "of facts outside of, but not inconsistent with the record" (*In re Mayfield,* 141 U. S., 107, 116; see also *Ex parte Lange,* 85 U. S., 18 Wall., 163).

In the instant proceeding (1) The return admitted that on October 6th, 1919, the date when the letter complained of was written, there was not pending awaiting decision any order or judicial determination mentioned in the letter (Record, fols. 2526, 2527). That was a fact outside of and not inconsistent with the contempt record. (2) *Proof was introduced* before Judge MANTON by the petitioner (a) of all the testimony and evidence taken in the District Court and (b) by concession and *stipulation* that there was no other evidence in the contempt record (Records, pages 877, 880; fols. 2631, 2639).

In *Cuddy, Petitioner* (*supra*) "all the minutes, records and files of the Court in the proceedings for contempt" were set out in the petition, instead of being proven on the hearing, and the Court discussed the facts fully. That course was also adopted *In re Hudgings* (*supra*). We have in the

case at bar the like of all that was before this Court in those cases.

That proof, *which is original proof in this proceeding,* demonstrates the non-existence in the District Court of the jurisdictional facts. The judge on the summary hearing, following the granting of the writ, was enabled to and was not precluded from coming to a determination, that there was "manifest want of criminality in the matter charged." *Ex parte Siebold,* 100 U. S., 376.

That was not a review of the proceedings before Judge MAYER, as by writ of error or appeal, as has been suggested, but the result of the summary hearing on the writ of habeas corpus, not inconsistent with the record in the District Court, as to the existence of the jurisdictional facts (*In re Mayfield,* 141 U. S., 107, 116). The point was tendered by the petition and was admitted by the return, as we have seen.

The summary hearing provided for in the Habeas Corpus Act "so that thereby the material facts may be ascertained" (U. S. Rev. St. §§754, 757-761), avoids any necessity for a writ of *certiorari,* which is sometimes issued as an auxiliary to a writ of habeas corpus. In the instant case, not only did the petitioner make proof, but express stipulation was made, that there was no other evidence before the District Court (Record, fols. 2631-2640). This fulfills the *concept* of a writ of certiorari frequently used as an auxiliary writ.

POINT X.

The objections raised to the form of the writ were unavailing to oust the circuit judge of power to act.

The majority judges of the Circuit Court of Appeals, in their opinions in this case, treat the writ of habeas corpus as defective in form. Circuit Judge HOUGH went so far as to say: "The so-called writ in this instance was a nullity * * *."

(Record, pages 1141-1142, fols. 3423-3426; pages 1159-1160, fols. 3477-3478.)

This was based on the circumstance that the paper lacked the seal of a Court and the teste of a Clerk. If a like contention be urged in this Court, we respectfully submit that Judges ROGERS and HOUGH misinterpreted the provisions of the Revised Statutes. They failed to recognize that, by reason of the nature of the writ and the manner of its use, an informality is permitted that might not be allowed in other cases. Section 751 relates to a writ of habeas corpus from the several *courts* mentioned and the words there used are "to issue all writs." The word "issue" is distinctly appropriate to a Court and in such instances the writ is allowed by the Judge and issued by the Clerk under the seal of the Court and attested by the Clerk under the seal of the Court, the three several acts, *i. e.*, allowance, signature and sealing being steps in the issuance of the writ. The provisions of Section 752 relate to the grant of a writ by the several *Justices and Judges* of said Courts. The word used is "grant," and it is distinctly appropriate to one function and the act of one functionary, in giving or granting the writ. When a thing is granted in ordinary legal parlance, nothing remains to be done; it is complete in itself; it needs not the sig-

nature of another, nor a seal impressed by another to effectuate it.

There are words of cognate value used in Section 754. The expression used there is "Application for writ of habeas corpus shall be made to the Court or Justice or Judge *authorized to issue* the same." This plainly implies that a Judge has authority not only to allow the writ, but also to issue it.

Under Section 755 the expression is "The Court or Justice or Judge to whom such application is made shall forthwith *award* a writ of habeas corpus," etc.

In making the formal return the Marshal stated that it was to the writ "issued herein" and "as commanded by the writ of habeas corpus herein."

The right to *grant* the writ is given to certain Judges, in addition to the right given to certain Courts to *issue* the writ. Revised Statutes, Section 752.

Circuit Judge HOUGH, in the Court below, by a fine-drawn distinction between the word "issue" in Section 751 and "grant" in Section 752 of the Revised Statutes, held that the power of the judge under the latter section was limited to the allowance of the issuance of the writ pursuant to the former section. His argument flies squarely in the face of the opinion of this Court in construing the power of court and judge under exactly identical language. *Ex parte Milligan,* 4 Wall., 2, 4, 110.

When so granted, the writ under the sign manual of a Judge, authorized to issue it, is as valid and effectual as though issued out of and under the seal of a Court. *In the Matter of Blair,* 4 Wis., 522, 531; as distinguished from writs issued out of Court. *State ex rel Taylor* v. *The Board of Supervisors,* 64 Wis., 218, 221-2. See also *Potter* v. *Frohbach,* 133 Wis., 1, 7-8.

The writ of habeas corpus granted in *Ex Parte Curtis,* 106 U. S., 371, was signed "M. R. Waite, Chief Justice of the United States," without teste, seal or clerk's signature, and was made returnable before "the Chief Justice of the Supreme Court of the United States" in New York City (See Transcript of Record in that case at page 2).

Section 911 of the Revised Statutes relates only to writs of Courts, as distinguished from writs granted by Judges, and it is, therefore, inapplicable in the case at bar. The practice adopted by the Chief Justice in the *Curtis* case disposed of the objections to the writ made by Circuit Judges ROGERS and HOUGH in the portions of their opinions quoted at the head of this point.

The learned United States Attorney objected that the writ was not upon its face directed to the Marshal or to anyone else. The words of the statute are:

> "The writ shall be directed to the person in whose custody the party is detained."

In this instance, it is true that the writ does not upon its face contain the name of the Marshal. It does contain, however, the words:

> "*We command you* that the body of Charles L. Craig, *in your custody detained,* as it is said."

It was thus directed to the person who had the custody, as directly as though he were named, and was so understood. Service of the writ upon the Marshal was followed by the immediate production of the body of the petitioner by the Marshal "as required by the writ" (Record, page 869; Statement of Facts prepared by the United States Attorney, Record, page 887). Later, without making any motion to quash (Record, page 871), the Marshal filed "*his* return *to the writ* of habeas corpus

publication that was the basis of the information was contemptuous, whether it was privileged, whether the information was sufficient, whether there was proof of publication, and similar questions.

Respondent questioned the authority of the judge to act as such. Petitioner, thereupon argued that the question was moot, because he had been designated to hold the District Court. (Record, pp. 853, 854, 868, 871.)

The judge then decided that the publication was not contemptuous, and therefore that the District Court in committing petitioner had acted in excess of its power. (Record, pp. 24, *et seq.*) An order discharging him from respondent's custody was made accordingly. From this order respondent appealed to the Circuit Court of Appeals, which reversed the order. This determination is now sought to be reviewed herein.

While that appeal was pending, and after a motion to dismiss it had been denied, the petitioner filed in this court a petition for a writ of certiorari or, in the alternative, for a writ of mandamus, in an attempt by a "short cut" to prevent the Circuit Court of Appeals from hearing the appeal on the merits. This petition was denied March 6, 1922.

ARGUMENT.

POINT I.

There was no issue of jurisdiction raised in the habeas corpus proceeding.

The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to retry the issues, whether of law, constitutional or other, or of fact.

Glasgow v. *Noyer*, 225 U. S. 420, 429.
Matter of Gregory, 219 U. S. 210, 213, 218.
Ex parte Watkins, 3 Peters 192.
Ex parte Parks, 93 U. S. 18.
Ex parte Yarbrough, 110 U. S. 651, 654.
Matter of Spencer, 228 U. S. 652.
Ex parte Kearney, 7 Wheat. 38.

Under these authorities the court had no authority to review questions of law by habeas corpus. The proper remedy is writ of error or appeal to a competent appellate court.

The court that committed the petitioner for contempt had jurisdiction of the subject matter of the contempt inherently and under section 268 of the Judicial Code.

It had jurisdiction of the petitioner's person because he came before it for trial and the method of getting him there is immaterial. (*Ker* v. *Illinois*, 119 U. S. 436.) In fact he was brought into court regularly and in accordance with settled procedure. The sentence imposed was within the District Court's power, since section 268 authorizes punish-

ment "by fine or imprisonment, at the discretion of the court."

Thus complete jurisdiction is shown. The questions which were presented as jurisdictional on the application for habeas corpus were mainly whether the publication was contemptuous, whether it was privileged, whether the information was sufficient, and whether there was proof of publication. These questions were obviously not jurisdictional but involved the merits of the case. Upon the first of these the order discharging the petitioner from the commitment was based.

These are all questions of law, that should be reviewed by an appellate court on writ of error or appeal. This orderly procedure was avoided. Petitioner instead sought and obtained by habeas corpus a review by a single judge of the Circuit Court of Appeals, *who had been designated to hold the District Court*. Having secured a favorable result, he then contended that the judge had acted as a circuit judge, and that his determination was not appealable to or reviewable by any court. The subject of appealability will be argued later. It is now strongly urged that the point herein presented is so well settled as to require no restatement in this case of the principles applicable to habeas corpus.

The exceptions to the rule, which require the courts on *habeas corpus* to go beyond the strict scope of the writ and consider other than jurisdictional questions are equally well settled. They will now be discussed.

POINT II.

The exceptions to the general rule as to the scope of habeas corpus do not include the case at bar.

These exceptions may be classified as follows:

1. Where there is a conflict of jurisdiction between a State and the United States.

2. Where the authority and operations of the Federal Government are or may be interfered with by State action.

3. Where rights or obligations of the United States under a treaty are involved.

4. Where the petitioner is held under State process based upon a State law which is in violation of the Constitution of the United States.

5. Where the judgment or order under which he is held is a nullity because in excess of the power of the court.

The first and second exceptions are closely related. The fundamental reason for the first four is the necessity of maintaining the supremacy of Federal laws and treaties in compliance with section 2 of Article VI of the Constitution. (*Tarble's case*, 13 Wall. 397, 406–407, 410–411; *Tennessee* v. *Davis*, 100 U. S. 257, 262; *Cunningham* v. *Nagle*, 135 U. S. 1, 73; *In re Watts*, 190 U. S. 1, 27.)

The fifth exception is of present interest, because petitioner apparently has sought to bring himself within it. *Ex parte Hudgings* (249 U. S. 378) is the most recent illustration of it. The facts there were peculiar and the case stands alone. The district

judge, presiding at a trial, formed the opinion that a witness, then testifying, was committing perjury by asserting and reiterating that he could not recall having seen certain persons write, although he had frequently associated with them. Thereupon, without any charge being preferred, without any proof of guilt being offered, without any evidence, without any hearing or any kind of legal proceeding, the court ordered the imprisonment of the witness for contempt by the commission of perjury, for an indefinite term and until he should purge himself of contempt by testifying to what the court conceived to be the truth, the reverse of his previous testimony. Under these extraordinary circumstances, which showed a clear want of jurisdiction, this court on habeas corpus freed the prisoner, using in its opinion guarded language manifestly limited strictly to the peculiar facts of the case. It was expressly stated that the case was exceptional.

The case at bar is entirely free from the arbitrary action commented upon by this court in the Hudgings case. In this case the proceedings to determine and punish the contempt were of a most thorough and deliberate nature. *The offense occurred on October 6th, 1919. The judgment of conviction and commitment were entered February 24th, 1921.* The intervening time was occupied with long arguments, both oral and written, on objections to the jurisdiction, a demurrer, a motion to quash, and finally with a trial of great length. The trial court had made the fullest and most patient

inquiry into all the facts before passing judgment and sentence.

The exceptional types of cases are classified in *Henry* v. *Henkel* (235 U. S. 228–229), wherein this court repeats a warning often previously stated and still disregarded by petitioners for habeas corpus:

> But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court.

POINT III.

The order reversed by the Court of Appeals was appealable to that court.

This point turns in the first place upon the question whether the order discharging petitioner was a court order or a judge's order.

If it were a judge's order, there would be a conflict as to the appealability of it. The Court of Appeals for the Eighth Circuit in *Webb* v. *York* (74 Fed. 753) in a well-reasoned opinion affirmed the appealability of such an order, but the Court of Appeals for the Fourth Circuit in *Hoskins* v. *Funk* (239 Fed. 278) denied it.

In the instant case the Court of Appeals found it unnecessary by reason of the facts to deal with the question. The order was made by a judge of the Court of Appeals, who had been designated to

hold the District Court. When his authority to act as a judge was challenged by respondent, as already stated, petitioner fell back upon the designation, and treated the question of his power as a judge as entirely moot. Proof of the designation was then made. And the judge in his opinion referred to the order designating him. Under these circumstances, the Court of Appeals very naturally decided the order was a court order made by him under the designation.

It refused to allow the petitioner to rely upon the designation as conferring jurisdiction to entertain the habeas corpus proceeding, and then to deny its effect for the purpose of defeating the appeal. In announcing this opinion the court stated that if the order were not a court order it would be a nullity because a judge of the Court of Appeals as such had no authority to issue a writ of habeas corpus. It is only in this sense that this case involves the question of the right of a judge of the Circuit Court of Appeals to issue the writ. If this court should be disposed to grant the petition upon the ground that this is an important question, it is respectfully submitted that the question does not arise in a form to be reviewed.

The court's conclusion is well supported by the plain meaning of the Statutes. These points, presented in skeleton form, without development, will indicate the basis for the conclusion:

1. A circuit judge has no authority except that conferred by statute. (*Whitney* v. *Dick*, 202 U. S. 132, 135–137.)

2. *Sections 117* and *118* of the *Judicial Code* define his authority. Neither section gives him power to grant or issue a writ of habeas corpus.

3. *Section 751* of the *Revised Statutes* authorizes the *Supreme Court*, the *Circuit Court* and the *District Court* to *issue* writs of habeas corpus. *Section 752* authorizes the *judges of the said courts* to *grant* writs of habeas corpus.

The latter section clearly does not refer to a judge of the Circuit Court of Appeals. He is not and never was a judge of the Circuit Court. And the powers of that court were never given to a judge of the Circuit Court of Appeals. Prior to the abolition of the Circuit Courts, *section 752* embraced all judges of the United States, but it does not now.

4. When the Circuit Court was abolished by the *act of March 4th, 1911* (36 Stat. 1167), its powers were transferred to the District Court. That part of the act making the transfer is *section 291* of the Judicial Code.

5. *The act of April 10th, 1869* (16 Stat. 44) conferring on the circuit judge for his circuit, "the same power and jurisdiction as the Justice of the Supreme Court allotted to the circuit," does not apply to a judge of the Circuit Court of Appeals. The act was continued in identical language by *section 607* of the Revised Statutes down to the adoption of the Judicial Code. That part of the *act of March 4, 1911*, which is now *section 297* of the Judicial Code, in explicit terms repealed *section 607* and all statutes

issued herein," and among other things, certified therein:

> "VIII. . . . *This respondent's custody of the petitioner complained of in the petition* was by virtue of and in obedience to, and the true cause of the detention of the petitioner was, a commitment duly and regularly issued out of the said Court requiring this respondent to take the petitioner into custody for the purpose of imprisoning him in the said Essex County Jail in execution of said sentence, a copy of which is hereto annexed as Exhibit II. . ."
>
> "X. This respondent has produced before your Honor the body of the petitioner *as commanded by the writ of habeas corpus herein*, and prays that the said writ be dismissed and that the petitioner be remanded to this respondent's custody to be dealt with in accordance with the said commitment." (Record, pages 846-847, fols. 2537-2540).

The objections to the writ are hypercritical in the extreme, and should be disregarded by this Court as they were eventually, by all the judges of the Court below.

> (See Especially Record, page 1142, fol. 3426; page 1162, fols. 3478-3479, and page 1176, fols. 3520-3521.)

It was proper for the tribunal before which the *habeas corpus* proceeding was properly pending to "elect to waive the issuance of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged."

Ex parte Milligan, 4 Wall. 2, 110.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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In the Supreme Court of the United States.

CHARLES L. CRAIG, PETITIONER,
v.
WILLIAM C. HECHT, UNITED STATES Marshal for the Southern District of New York, respondent.
No. 488.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

The petitioner was tried upon an information, alleging contempt of the United States District Court for the Southern District of New York, found guilty, and committed by that court. *No writ of error from the judgment of conviction was ever applied for.* The petitioner instead within a few hours after his commitment obtained a writ of habeas corpus from a judge of the Circuit Court of Appeals for the Second Circuit, who at the time was designated to hold the District Court. In the habeas corpus proceeding thus initiated the petitioner raised the questions, whether the

enacted prior to February 1st, 1911, which authorized the appointment of circuit judges.

6. Except when he holds the District Court by assignment or sits under a special statute like the *expedition act of February 11th, 1903* (32 Stat. 803), the only functions of a circuit judge to-day are as a member of the Court of Appeals and distinctly appellate.

Whitney v. *Dick*, 202 U. S. 132.
McLish v. *Roff*, 141 U. S. at page 666.
Lau Ow Bew v. *United States*, 144 U. S. 55–6.

The term "circuit judge" as used to-day has been adopted as the most convenient designation for a judge of the Court of Appeals. It is not used in the sense of the old statutes enacted prior to the abolition of the Circuit Court. Petitioner has used the term in that sense, and has treated it as if it meant "judge of the Circuit Court." Manifestly, the judge of the Circuit Court of Appeals, who discharged petitioner, was not a member of a court which had long been abolished.

There being ample other provision for judicial inquiry into restraints of liberty, there is no occasion to stretch *section 752* so as to spell out authority for the present circuit judges to grant writs of habeas corpus. Such a strained construction is not necessary in order to prevent a failure of the constitutional guaranty against suspension.

Whitney v. *Dick*, 202 U. S. 132, 135.
Matter of Tracy, 249 U. S. 551.

The Circuit Court of Appeals finding that there was no basis whatever for a claim of such authority by one of its members concluded, from the insistence throughout the habeas corpus proceeding on the designation of the circuit judge to hold the District Court, that his order was intended to be and in fact was a court order. The conclusion is irresistible. It takes from the view of this court the question whether a present circuit judge has power to grant habeas corpus. Besides, the conclusion reached on that question is so obviously correct as to require no statement of the law by this court.

In passing, it may be observed that the circuit judge did not become a district judge by the designation. He was assigned to hold the District Court. And any order he made thereunder was a court order.

Finally since the order was a court order there is no question of its appealability.

POINT IV.

The paper called the writ of habeas corpus was not in fact such.

A writ of habeas corpus is process. As such it should issue out of the court under its seal and should bear the *teste* of the clerk of the court in the name of the Chief Justice or the senior District Judge. (*In re Kaine*, 14 Howard, 103, 119.)

The "writ" in question had none of these essentials of process. It was therefore void and any order based on it is void. (*In re Kaine, supra.*)

CONCLUSION.

The petition should be denied.

JAMES M. BECK,
Solicitor General.
WILLIAM HAYWOOD,
United States Attorney.
DAVID V. CAHILL,
Assistant United States Attorney.

SEPTEMBER, 1922.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

CHARLES L. CRAIG, PETITIONER, *v.* WILLIAM C. HECHT, UNITED STATES MARSHAL for the Southern District of New York, respondent.	No. 82.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

By this writ of certiorari review is sought of a judgment of the Circuit Court of Appeals for the Second Circuit which reversed an order of the court below sustaining a writ of habeas corpus, and which remanded the petitioner to the custody of the Marshal. (282 Fed. 138.)

STATEMENT OF THE CASE.

The petitioner, Charles L. Craig, was Comptroller of the City of New York, its chief financial officer, and as such a member of the Board of Estimate and Apportionment, the real governing body of the city.

On October 6, 1919, Craig wrote a letter to Lewis Nixon, Public Service Commissioner, which is set

forth on pages 8 to 11 of the record. Copies of this letter were immediately given out for publication from the office of the Comptroller in the manner usually employed to give publicity to the affairs of that office and its chief, and were published in the New York City daily morning and evening papers. Thereupon the United States Attorney filed an information against Craig charging him with contempt of court, and the court made an order directing Craig to show cause why he should not be punished for that offense. Craig appeared, moved to quash the information, demurred to the information, and finally pleaded not guilty. The case then went to trial and after numerous hearings were had and a great volume of testimony and exhibits received, Judge Mayer found Craig guilty of contempt and sentenced him to be imprisoned for a term of sixty days (p. 37)—not six months, as stated by Judge Manton in his opinion (p. 15).

Craig then filed, before Hon. Martin T. Manton, a Judge of the Circuit Court of Appeals for the Second Circuit, a petition for writ of habeas corpus, pursuant to which Judge Manton issued the order upon page 32 of the Record, which is the paper referred to in the case as a writ of habeas corpus. Annexed to the petition, or by its terms made a part of it (pp. 34, 42), were the records of the proceedings before Judge Mayer. On this petition a return was made and to the return a traverse was filed. Judge Manton thereupon took the case under advisement and on

April 29, 1921, announced his decision in an opinion printed on pages 6 to 31 of the Record. His conclusion was that the petition for discharge should be granted, and to the foot of his opinion he appended an order that the papers be filed with the Clerk of the United States District Court for the Southern District of New York and that this order should be recorded in said court and signed it "Martin T. Manton, U. S. Circuit Judge."

No writ of error to review the decision of Judge Mayer was ever taken, and the time to do so has long since expired. The Marshal (at that time Thomas D. McCarthy, for whom the respondent Hecht was subsequently substituted) thereupon took an appeal to the Circuit Court of Appeals for the Second Circuit. The petitioner, Craig, made a motion in the Circuit Court of Appeals to dismiss that appeal, which was denied. He also applied to this Court for a writ of certiorari, or in the alternative for a writ of mandamus, in an attempt to prevent the Circuit Court of Appeals from hearing the appeal on the merits. That petition was denied March 6, 1922. Finally, the appeal was heard by the Circuit Court of Appeals on the merits. That court reversed the determination of Judge Manton and remanded Craig to the custody of the Marshal. (282 Fed. 138.) Craig then applied to this Court for a writ of certiorari. The writ was granted, and thus the case comes before this Court.

THE FACTS.

A proper understanding of the case requires a statement of the facts at some length.

Two great street railroad systems, one in Brooklyn and the other in Manhattan, were in the hands of receivers appointed by Judge Mayer in the United States District Court for the Southern District of New York. Lindley M. Garrison was the Brooklyn receiver and Job E. Hedges was the Manhattan receiver. One of the holding companies allied with the Manhattan railroad companies had been put in bankruptcy by the same court, and James R. Sheffield was Trustee in Bankruptcy of that company. These receiverships had been a matter of great public interest and wide discussion in the City of New York. The matter of a five-cent fare upon these railroad systems was naturally one of deep concern to the traveling public of that city, and the fear that from the receivership proceedings an increase in fare might result had been utilized to the limit for political effect. The Brooklyn Rapid Transit Co. receivership suit was commenced December 31, 1918, and Judge Garrison was made permanent receiver on January 15, 1919 (p. 45). On January 15, 1919, the Public Service Commission for the First District moved for leave to intervene in that suit in the name and on behalf of the City of New York and for the appointment therein of a coreceiver (p. 45). On the same day, pursuant to a resolution of the Board of Estimate and Apportionment, the

Corporation Counsel of New York City applied to the Court for the appointment of Mr. Craig as coreceiver. Judge Mayer denied both these motions in a memorandum which appears on page 46. On January 22, 1919, Judge Mayer made an order directing that notice of all subsequent proceedings in that suit, other than those relating to the ordinary current administration of the receivership, should be given to the Solicitors for the City of New York and the Public Service Commission.

The New York Railways suit was commenced March 20, 1919, and on March 30 the Court appointed Mr. Hedges permanent receiver. Bankruptcy proceedings against the Interborough Consolidated Corporation was begun on March 21, 1919, and on the same day Mr. James R. Sheffield was appointed receiver, and on April 15 he was made trustee (p. 49).

Prior to September 1, 1919, by an order of the court made by Judge Mayer, Stone & Webster, expert engineers, were employed by the receivers to make a report of the financial position of the corporations and the properties involved in the suits, and on September 14 they made a preliminary report. On the filing of that report Judge Mayer filed a memorandum, dated September 6, 1919, containing, among other things, directions to the receiver and trustee to send a copy of the summary of Messrs. Stone & Webster and the court's memorandum to the State and municipal authorities and to civic and taxpayers' associations of New

York City, and in that memorandum Judge Mayer said:

> At the same time the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations, to satisfy themselves in respect to the actual financial and other conditions existing in relation to the corporations now in their official charge (p. 50).

On September 8 a copy of the report and of the Court's memorandum was sent to Mr. Craig (pp. 50, 51).

On October 1, 1919, Lewis Nixon, Public Service Commissioner, addressed identical letters to the members of the Board of Estimate and Apportionment, to Receivers appointed by the court, to transit officials, and to representatives of security holders inviting them to attend a conference to be held at the office of the Public Service Commission on the morning of October 6, 1919 (p. 821).

At the time and place designated the conference began, but Craig was not present.

After some discussion the Commissioner concluded that a full and free consideration of the subject matter could be more effectively undertaken in a closed conference and thereupon various spectators and newspaper men left the room (p. 822).

After this had occurred further discussion took place and then the Public Service Commissioner read the letter which he had received from Craig (p. 822). Meanwhile copies of the letter were being distributed

to the press from Mr. Craig's office. On the same day Judge Mayer filed an order directing the United States Attorney to "advise the court by formal information concerning the conduct of one Charles L. Craig on October 6, 1919, at which time he is reported to have published or caused to be published a written communication addressed to Hon. Lewis Nixon, Public Service Commissioner," concerning the orders and action of the court in a pending cause or causes (p. 822).

On November 3, 1919, the United States Attorney filed an information charging petitioner with contempt of court. The information is set forth in full beginning at page 44. After a recital of facts the information charged that in four specific respects the statements in the letter were false and were known by the defendant to be false when made and were made in reckless disregard of the truth. Briefly these statements alleged to have been false were:

(1) That the court in the suits and proceedings referred to was responsible for a policy of denying to the petitioner Craig and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of various public-utility corporations in the hands of receivers appointed by the court, and holding franchises to operate in the streets of New York; whereas, in truth and fact, the court had never adopted such a policy, but on the contrary, had afforded to the petitioner and

the members of the Board of Estimate every facility for obtaining information and had expressly directed that the city and its officials should have access to such information and that neither the court nor anyone acting under its authority had ever denied such access or information.

(2) That the court had made orders which precluded any application being made by the authorities of the city of New York to any other court or judge for any right of examination into the affairs of the public utility corporation; whereas, in truth and in fact, the court had never made any such order.

(3) That the orders of the court denied to the authorities and to the city the opportunity to ascertain the truth; whereas, in truth the court had never made any such order that had or could have such effect, but, on the contrary, had ordered that the city authorities should have every opportunity and facility for ascertaining the truth.

(4) That it was stated that an order of the court stood between the public and the truth; whereas, in truth no order that the court had made had or could have such effect.

Thereafter an order was signed by Judge Mayer requiring the petitioner to show cause on December 2, 1919, "why he should not be declared and adjudged in contempt of this court by reason of the facts set forth in the said information" (p. 825).

Counsel for petitioner appeared specially and raised questions as to the jurisdiction of the court

which were decided adversely to the petitioner. The court then set December 29, 1919, as the time for the appearance of the petitioner (p. 825). The petitioner's next step was to demur to the information on 28 grounds. The court overruled the demurrer and filed an opinion in respect to the questions raised and ordered petitioner to plead to the information. *United States* v. *Craig*, 266 Fed. 230. Petitioner pleaded not guilty and the trial began on May 10, 1920, and was concluded on June 10, 1920. The testimony was transcribed in 791 pages of stenographic minutes. The exhibits were many and voluminous. In response to the request of counsel, and, in view of the length of the record and the many exhibits, the court set a date in the autumn for the submission of briefs. Extensions beyond the original date set were asked for and granted. The case was finally submitted shortly after October 30, 1920 (p. 826).

On February 24, 1921, Judge Mayer decided it, holding Craig to be guilty of contempt and directing that he appear on that day at 2 o'clock in the afternoon "for such further proceedings herein as may be proper" (p. 839). Judge Mayer's opinion concludes as follows:

> It is not a wrong with which the judge concerns himself in a personal sense, and for that reason no personal apology is desired nor required. The wrong has been perpetrated against the administration of justice.

> The reparation which is within the power of the defendant is promptly to make and file in the office of the Clerk of the Court an unqualified retraction of the false statements respecting the court, referred to in Paragraphs 1, 2, 3, and 4 of the information.

The record does not show that Craig availed himself of this opportunity to purge himself of the contempt and he was thereupon sentenced to imprisonment for 60 days.

This outline of the proceedings shows that Judge Mayer did not proceed summarily and that his decision was not the result of personal pique or infirmity of temper. He directed the District Attorney to advise the court and after almost a month of consideration that official filed the information. Thereafter every right of the petitioner was protected by able and astute counsel. The record shows, furthermore, that not merely were his rights guarded by counsel and respected by the court, but that every courtesy was afforded both to counsel and to Craig himself. The final opinion of Judge Mayer shows not only laborious and painstaking care, but the dignity and poise befitting a judge. The only reparation asked was the retraction of charges found beyond all question to have been, not merely false, but devoid of the slightest element of truth. "More in sorrow than in anger" Judge Mayer deliberately and dispassionately vindicated the dignity of his court and the majesty of law, only to have such vindication summarily nullified by a single judge on a writ of *habeas corpus*.

The opinion considers the various elements entering into the offense in detail.

As to publication, it was found that after the letter was dictated the stenographer, pursuant to petitioner's directions, read the letter to the members of the Board of Estimate and Apportionment. It was not marked private or personal and was sent by hand to the Public Service Commissioner, who was then holding the conference previously referred to. All such letters, according to Craig's testimony, are filed in the Comptroller's Office and open for public inspection, and from the practice in the Department of Finance the petitioner knew that such a letter would become public and would be published in the newspapers; and, as a matter of fact, it was given out in the usual course to reporters and representatives of press associations in the form of tissue copies known to the newspaper craft as "flimsies," and was given wide publicity

As to the charge of denial of access to the sources of information regarding the public service corporations, the court (p. 832, 833) reviews the evidence and finds the charge to be false. The finding is based, in part, upon the testimony of Craig himself, that access had never been denied to him, and that he had never made any application of any kind or description for access to original sources of information or any information whatever.

On the question of intent, Judge Mayer reviewed the testimony of Craig to the effect that he did not intend to commit any contemptuous act nor to charge

any wrongful conduct against the court, and that what he said as to the policy of denying access was not intended to refer to any actual occurrences, but to the result which, from his point of view, flowed from the refusal to appoint him coreceiver. Judge Mayer held, however, that it is a fundamental principle that men are held responsible for the natural consequences of their acts, and that the plain meaning of petitioner's language was to charge the court with conduct incompatible with the due administration of justice, that the charges were false, and that the effect was "to obstruct the administration of justice." Citing *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402.

From this conclusion we see no reasonable escape. It is to be remembered that Craig was not an irresponsible and inconspicuous critic or fault finder; he was the chief financial officer of the greatest city in the country, an elected officer of that city, as well as a lawyer of experience, ability, and standing, and a member of the most powerful body in the administration of the affairs of that city. He acted with deliberation. The secretary of his department, to whom he showed the letter, expressed to him the opinion that "it was a pretty strong letter." It was read to the members of the Board of Estimate and was then sent to Mr. Nixon, and the copies distributed to the newspapers.

Mr. Craig in his testimony tries to create the impression that the letter was written under the pressure of important public duties and that the phrase-

ology was due to the fact that he did not regard Mr. Nixon as a man of "quick perceptions of the actual necessity of the situation" nor "of a quick grasp of the verities"; that his mind was slow, and that in order to bring the thing forcibly into his "inner consciousness it was necessary to express the matter with as much vigor and terseness as possible" (p. 607). If his desire had been to express himself in such manner as to make it sure that any person of ordinary or even limited intelligence would gather the impression that he charged the District Court of the United States with gross misfeasance and malfeasance, he could not have chosen his language better.

The nature and obvious effect of the publication of such a letter must have been well understood by a man of his intelligence. He spoke with the prestige of a great office; his voice would be interpreted by the people as that of their city government. It was virtually his proclamation to its citizens that the District Court of the United States was standing between their elected officials, who were aggressively striving to protect their rights and the rights of the city, and the hated traction companies, commonly referred to in that city as "the traction trust," and, by its orders and policies, was preventing the officials from exposing the alleged rascalities of management which, we have been so often told, had characterized the management of those companies.

This challenge the Court met promptly, but with deliberation; fairly, but without fear.

After conviction, Craig had a right of review by writ of error, direct to this Court upon constitutional or jurisdictional grounds, or to the Circuit Court of Appeals on the entire case. Waiving by neglect this remedy provided by statute, he appealed to Hon. Martin T. Manton, one of the judges of the latter Court, by a petition for writ of habeas corpus.

THE PROCEEDINGS BEFORE JUDGE MANTON.

(a) *The right to review by habeas corpus.*

When the proceedings before Judge Manton came on to be heard the question of the power of the court to review by habeas corpus the decision of Judge Mayer was raised by the United States Attorney, and upon that point petitioner's counsel stated his position as follows (p. 880):

> Now, we wish to present these jurisdictional points to your Honor, keeping closely within the confines of the proper office of a writ of habeas corpus, upon the following four heads or propositions: That there was no jurisdiction to punish for contempt and that the court acted in excess of its powers, and without any evidence of contempt, upon the following grounds or subdivisions—First, the communication was privileged, and, incidentally, that there was no publication of it; secondly, that the matter contained in the letter was not contemptuous in substance;

> thirdly, that there was nothing pending sub-judice at the time the letter was written, and as to that, there is an astonishing admission in the return to this writ of habeas corpus, which is sufficient in itself to sustain the writ; and, fourth, that there was no misbehavior such as to obstruct the administration of justice; fifth, the matter that I have referred to before, that there was no prayer to the information, which is a procedural matter.

We have here, then, a recognition by petitioner's counsel that the only question which could be raised on habeas corpus would be that of the jurisdiction of Judge Mayer to hear and determine the case and impose sentence, and we have his statement of the alleged jurisdictional questions to be considered. The record in its entirety taken before Judge Mayer was submitted to Judge Manton, and his opinion shows that he reviewed the case on the merits and reached a conclusion contrary to that of his brother judge.

(b) *The power of a Circuit Judge to issue the writ of habeas corpus.*

Upon the filing of the return and a traverse thereto, the United States Attorney raised the point that a judge of the Circuit Court of Appeals had no authority to award or issue a writ of habeas corpus (pp. 871, 872). Judge Manton overruled this point (p. 873).

Before the return was filed, there was a colloquy between Judge Manton and counsel (p. 870), in which the court said:

> Now, before doing that, Mr. Mooney, do you want this presented to me as Circuit Judge, or do you want to submit it to me as Circuit Judge sitting in the District Court?

To which Mr. Mooney replied, in substance, that he had presented the petition to Judge Manton as a Circuit Judge, but nevertheless he offered to put in proof in a formal way, or ask Judge Manton to take judicial notice of the fact, that he had at that time been designated to sit in the District Court. The United States Attorney called attention to the point that it might involve the question of the right of the party against whom the decision should be made to appeal, and thereupon stated that—

> Mr. Mooney should take a position one way or the other.

To which Mr. Mooney replied:

> I am taking it. I never have any doubt as to what position I am going to take. I am going to take my position exactly as it was when I started, and I am going to keep it, but I am going to do a little bit more than that. I am going to take such a course with regard to the proofs as will render the point suggested by Colonel Caffey an entirely moot or academic point. I shall insist that we shall proceed in the way that we started, and that we proceed in that way to the end.

And the Court said:

> All right.

Thereafter (p. 873) the court denied the motion to dismiss, made upon the ground that the Circuit Judge had no jurisdiction to grant the writ, and then the United States Attorney moved that Judge Manton proceed to hear the application as a District Court, to which the court replied:

> I think that lies largely with the applicant. What do you wish to do about it, Mr. Mooney? (P. 874.)

Mr. Mooney's reply, in substance, was that the writ was issued by Judge Manton as a Circuit Judge, and, in addition thereto, he had been designated formally under the statute to hold proceedings as a District Court, and that there were superadded to his powers any necessary powers and activities of a District Court judge. Judge Manton finally ruled that it rested entirely with Mr. Mooney to proceed as he chose, and denied the motion, "in view of the opposition" (pp. 875, 876). This was on March 19, 1921.

Thereafter, but at the same session, Mr. Mooney called the Chief Deputy Clerk of the United States District Court for the Southern District of New York (p. 881), who produced the designation of Judge Manton to sit in the District Court, which was received in evidence (p. 882), and, by the testimony of the Clerk, it was shown that, following the designation, Judge Manton was actually engaged in the performance of business of the District Court and of the

District judge on the 24th day of February, 1921, when the petition for the writ was presented, and that no judge was attending to the chambers' business in the District Court on that day except Judge Manton (p. 885).

The importance of these facts appears from the claim made before the Circuit Court of Appeals that Judge Manton's order discharging Craig from custody was not appealable because it was a judge's order and not a court order.

(c) *The order of Judge Manton.*

Judge Manton's decision was announced in an opinion printed upon pages 6-31, inclusive, of the Record. It is entitled:

> Before—Hon. Martin T. Manton, United States Circuit Judge. In the Matter of the Application of Charles L. Craig.

and it is signed:

> Martin T. Manton, U. S. Circuit Judge.

At the foot of it and without any caption is the following:

> It is ordered that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York, in his Office in the Post Office Building, in the Borough of Manhattan, City of New York, and that this order be recorded in said court. Dated, April 29, 1921.
>
> MARTIN T. MANTON,
> *U. S. Circuit Judge.*

Apparently the opinion and the order were included in one paper, for the only file mark is at the foot of the order and the printed record describes the opinion as—

Order sustaining writ of habeas corpus.

It is obvious that several questions of grave importance affecting the orderly administration of justice in the criminal courts arise upon these facts. The first, of course, is the power of one judge to review a trial held before another judge of equal authority and, in substance, to reverse it; another is the right of a Judge of the Circuit Court of Appeals to issue the writ of habeas corpus; and another is the right of a judge, thus assuming to act, to frame the order which he makes in such way as to permit or prevent its review on appeal, as he may deem proper. If this can be done, any criminal case tried in a United States District Court may be thus nullified and review of the nullifying decision prevented. The record in the case of *David Lamar* v. *The United States*, October Term, 1922, No. 201, decided January 29, 1923, illustrates this point. In the *Lamar case*, Lamar presented his petition for a writ of habeas corpus to Judge Manton on January 6, 1921, and the point was made in that case by the United States Attorney that a Circuit Judge had no power to issue the writ. Nevertheless he assumed jurisdiction and "announced that in hearing the proceeding he would sit as a Circuit Judge and not as a Court" (pp. 47, 48 of that record). While that case was pending before him, the petition in the present case was filed,

as before stated, on February 24, 1921. In deciding the present case, Judge Manton refers to the *Lamar case* and states:

> I have held heretofore that a Circuit Judge has such power. (*In re David Lamar*, N. Y. Law Journal, April 4, 1921.)

According to the record in the *Lamar case*, Judge Manton filed his opinion in that case on March 2, 1921. (See p. 46 of Record in *Lamar* v. *United States*.) The opinion and order in the present case was dated April 29, 1921. On the 3d day of March, Judge Manton entered an order in the *Lamar case* upon his opinion of the day before, entitled "At a stated Term of the United States District Court for the Southern District of New York" (p. 46 of that record). The order was a Court order. And on the same day Lamar presented a petition for appeal to this court, with an assignment of errors, to Judge Manton, who allowed the appeal and admitted Lamar to bail in the sum of $25,000. On the very day that Judge Manton entered his order in the United States District Court in the *Lamar case* and allowed Lamar's appeal—that is, March 3, 1921—in the proceedings in the case at bar, Mr. Caffey, United States Attorney, in the course of the discussion heretofore referred to, addressed Judge Manton as follows:

> It has to do with the question whether after a final decision the party adverse to whom the decision is rendered will be entitled to an appeal, and therefore Mr. Mooney should take a position one way or the other now.

So, in two cases pending before the same judge at the same time, both instituted in the same manner and both involving the question whether the judge was sitting as a judge or as a Court, he entered an order in one case (the *Lamar case*) which unquestionably was appealable as a court order and thereupon admitted Lamar to bail, although he had stated that he was sitting as a Circuit Judge and not as a Court, and in the other case (the present one) he made an order, an appeal from which was questionable, as was pointed out to him, and the right to appeal from which has always been denied by petitioner's counsel, and which is one of the questions now presented to this Court.

BRIEF OF THE ARGUMENT.

1. The Judgment of conviction rendered by the District Court was final and conclusive until reversed on writ of error.

2. The matters litigated before Judge Manton did not involve the jurisdiction of the Court which tried and sentenced the Petitioner, and the proceedings amounted to a mere review on the merits for which a writ of error was the proper remedy.

3. The writ of habeas corpus may not be used as a substitute for a writ of error.

4. A Judge of the Circuit Court of Appeals, since the Circuit Court was abolished, has no power to grant the writ of habeas corpus.

5. The order of Judge Manton was appealable to the Circuit Court of Appeals.

6. The judgment of the Circuit Court of Appeals was correct and should be affirmed.

ARGUMENT.

I.

The judgment of conviction rendered by the District Court was final and conclusive until reversed on writ of error.

The District Court had jurisdiction of the person of the offender and of the offense, and the sentence imposed was within the power of the Court.

There can be no dispute as to jurisdiction of the person. Craig appeared in person (paragraphs 10 and 12 of petition for writ, p. 35; paragraph 7 of return, p. 844; paragraphs 8 and 9 of the traverse, p. 858), pleaded to the information, and testified (pp. 573–724).

It is equally indisputable as a matter of law that the trial court had jurisdiction of the subject matter, the contempt. It had inherent power, independent of any statute, to punish this class of offenses. "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

Ex parte Robinson, 19 Wall. 505, 510.
In re Debs, 158 U. S. 564, 594–596.
Toledo Newspaper Co. v. *U. S.*, 247 U. S. 402, 418.

Section 268 of the Judicial Code confirmed the power already existing. The authority conferred by that statute clearly embraces the class of offenses to which the appellee's offense belongs.

Toledo Newspaper Co. v. *U. S.*, 247 U. S. 402, 418–420.

The sentence imposed by the trial court was within its jurisdiction. This is clear from the language of Section 268, which authorizes punishment by "fine or imprisonment, at the discretion of the court."

Therefore, the proof showed jurisdiction of the person, jurisdiction of the subject matter, and a sentence within the Court's power. No issue of jurisdiction is left. The petitioner urged certain issues of law and fact as affecting the Court's jurisdiction and as being therefore jurisdictional in their nature. They are set forth in paragraph 17 of the petition for the writ (pp. 38 et seq.).

As stated by counsel before Judge Manton, they are reduced to six propositions (p. 880):

1. The letter of October 6, 1919, constituting part of the information, was privileged.

2. The matter contained in the letter was not contemptuous in substance.

3. There was nothing pending *sub judice* before the District Court at the time the letter was written.

4. The alleged misbehavior was not such as to obstruct the administration of justice.

5. There was no prayer to the information.

6. There was no proof that the defendant (petitioner) published the letter in the newspapers.

Therefore, it was argued that the trial court acted in excess of its power and without jurisdiction. The limited scope of a habeas corpus proceeding will be discussed in the next point. It is pertinent, however, to point out here that every one of these

issues was open to review on writ of error from this Court, as the judgment of conviction was unquestionably a final decision. (Sec. 128, Judicial Code; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336–338.)

The first five of these questions were raised in the trial court by a demurrer to the information (pp. 82–86) and were determined by that Court. The sixth proposition, that there was no evidence of publication, is clearly a question of law, and, like the other questions, was reviewable on writ of error.

Assuming that the trial court's determination of every one of these questions was erroneous, none of them would be within the scope of habeas corpus.

In the famous and often-quoted case of *Ex parte Watkins*, 3 Peters, 192, decided in 1830, release by the Supreme Court upon writ of habeas corpus was sought by a prisoner held under a judgment of conviction in the District of Columbia Circuit Court. Chief Justice Marshall thus stated the law applicable to the situation (p. 203):

> An imprisonment under a judgment can not be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is com-

petent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case as in the other; and must remain in full force, unless reversed regularly by a superior court capable of reversing it.

And that law, we submit, remains unchanged today, the law of the land. We could submit a very broad roll of authorities but content ourselves with referring to the most recent case of *Riddle* v. *Dyche*, decided May 21, 1923.

II.

The matters litigated before Judge Manton did not involve the jurisdiction of the court which tried and sentenced the petitioner, and the proceedings amounted to a mere review on the merits for which a writ of error was the proper remedy.

All the evidence taken before Judge Mayer was placed before Judge Manton as part of the petition for the writ. The only additional evidence was the testimony of the Clerk regarding the designation of the Judge to hold the District Court and the fact that he acted pursuant to the designation. Judge Manton's opinion, after affirming his jurisdiction and citing his previous decision in the *Lamar case*,

cites numerous authorities and reaches several conclusions which are sound, among them that a writ of habeas corpus can not be made to perform the office of a writ of error; that in a contempt proceeding it may be available to relieve a prisoner from the restraint imposed if the judgment is void on the ground that the Court was without power to make it; and if the Court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally. These conclusions are unquestionably sound. He concludes that the determining inquiries to be made by him are:

(*a*) Had the District Judge jurisdiction of the person and subject matter?

(*b*) Was the sentence imposed within its power?

These questions were beyond doubt the only questions which he had the right to consider. He quotes authorities, analyzes the evidence, and observes very properly (p. 27):

> To vindicate the dignity of the Court in compelling respect and obedience, a judge may best demonstrate his title to respect by keeping within the confines of judicial obligation and not reaching out beyond his powers.

His conclusion is that "By no interpretation can the letter be said to have any tendency to embarrass or influence the court so as to prevent a fair trial or a just conclusion in regard to any matter which

was then pending before the Court." In reaching this conclusion he apparently adopts the view of the petitioner Craig. He says (p. 25):

> It will be observed that the entire letter refers to the denial of the application to appoint a co-receiver. The purport of the letter, taken as a whole, is a criticism of the district judge who denied the application. If the Comptroller were appointed coreceiver, he would have the access he sought as a matter of right. The finding of the district judge is that he had it as a matter of favor. Therefore, it is concluded that the statement of the denial of access is false.

And his conclusion upon the whole matter is that the letter was not contemptuous and the act was not committed in the presence of the court or so near thereto as to obstruct the administration of justice within the meaning of the case of *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402. He holds (pp. 27–28):

> The misbehavior must present an interruption which comes between the court and the consideration of the subject matter then under submission in some way as to distract the mind of the court and pervert the course of justice, or even to divide the attention of the court. No such conclusion can be reached in the case at bar.

He also holds that there was no cause pending within the rule, and concludes his opinion (p. 31):

> * * * He [Craig] stands convicted upon his letter alone and such inferences as may be

> drawn therefrom. His conviction rests upon an issue between the court and the defendant and it is one of terminology or interpretation.
>
> There is no criminal intent discoverable from this record to support the interruption (*sic*) placed upon it by the Court, nor was there pending *sub judice* a proceeding before the Court at the time the letter was written.
>
> The conclusion is irresistible that the Court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty.
>
> The petition for discharge is granted.

The questions thus considered, it will be observed, are the same questions litigated before Judge Mayer. Judge Manton differed with Judge Mayer as to facts and inferences to be drawn from the facts. That is all. And having decided that Craig was not guilty, he concluded that Judge Mayer was without jurisdiction to find him guilty.

If this be the law, then no court has jurisdiction to try any person until his guilt has first been established as a fact.

But the law is that the findings of the trial court may not be attacked collaterally, nor can the record be examined to see whether there is evidence warranting a conviction.

In *Harland* v. *McGourin*, 218 U. S. 442, 444–449, this Court squarely held that in habeas corpus proceedings it is not open to litigate as to whether there was any evidence warranting a conviction and said (p. 448):

> The contention is that in the respects pointed out the testimony wholly fails to sup-

port the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.

To the same effect see also:

Ex parte Carll, 106 U. S. 521, 523.
In re Debs, 158 U. S. 564, 600.
Matter of Gregory, 219 U. S. 210, 214, 217–218.

III.

The writ of habeas corpus may not be used as a substitute for a writ of error.

(a) *The Court on habeas corpus is limited to jurisdictional questions.*

This Court made an unmistakably clear statement of this proposition in the case of *Glasgow* v. *Moyer*, 225 U. S. 420. There in his petition for habeas corpus the petitioner made the most sweeping allegations of every kind of illegality, including matters of fact and law and constitutional defects. Assuming the truth of all the allegations, the Court declared that they raised no question within the purview of the court on habeas corpus. After citing

several of its own decisions, as illustrative of the principle, the Court said (p. 429):

> The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus can not be employed to retry the issues, whether of law, constitutional or other, or of fact.

Matter of *Gregory*, 219 U. S. 210, 213, 218, is especially enlightening. There the same principle was applied. The defendant had been convicted in a police court of the District of Columbia on a charge embodied in an information. The sole evidence was an agreed statement of facts. It is difficult to conceive a type of inquiry more squarely presenting the question whether on writ of habeas corpus there can be a review of the legality of the conviction. In the opinion of the Court, Mr. Justice Hughes said (p. 213):

> The only question before us is whether the police court had jurisdiction. A habeas corpus proceeding can not be made to perform the function of a writ of error, and we are not concerned with the question whether the information was sufficient, or whether the acts set forth in the agreed statement constituted a crime—that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment.

Again, at page 218, after referring to the Watkins and Parks cases, infra, the Court said:

> In hearing this application this court does not sit to review the correctness of the con-

clusion of the police court as to the violation of the statute by the petitioner, or of the decision of the Court of Appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction the application for a writ of habeas corpus must be denied.

Harlan v. *McGourin*, 218 U. S. 442, is another illustration of the principle. There petitioners after conviction of a crime sought release upon habeas corpus on the ground that there was a total lack of evidence to sustain the conviction and other similar grounds. The Court dismissed the appeal and declined to consider the questions submitted, saying (p. 448):

> The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.

(b) *To warrant discharge on habeas corpus, the judgment, upon which the commitment is based, must be not merely erroneous, but absolutely void.*

This proposition excludes from consideration any error, however vital or prejudicial it may be deemed. The remedy for error is by writ of error. The cases on this proposition are so varied and so strongly stated as to leave no doubt of their purport or effect.

The case of *Ex parte Watkins*, 3 Peters, 192, decided in 1830, has already been cited.

Ex parte Parks, 93 U. S. 18, is explicit upon the same point. There release was sought from a court having power to issue a writ of habeas corpus. The ground on which the application was predicated was that the indictment—just as argued in the court below as to the information in the case at bar—did not state an offense. The crime charged was forgery. It was contended that a receipt described in and made the basis of the indictment was not the character of document that was the subject of forgery; just as petitioner says here that his letter was privileged, not contemptuous in substance, not obstructive of the administration of justice, and the like. In disposing of the matter this Court said (p. 20):

> But the question whether it was or was not a crime within the statute was one which the District Court was competent to decide. It was before the court, and within its jurisdiction. No other court except the Circuit Court for the same district, having concur-

rent jurisdiction, was as competent to decide the question as the District Court.

Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings—on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case.

With respect to an identical situation, in *Ex parte Yarbrough*, 110 U. S. 651, 654, this Court said:

Whether the indictment sets forth in comprehensive terms the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law, which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction.

Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which can not be looked into on a writ of habeas corpus limited to an inquiry into the existence of jurisdiction on the part of that court.

In *Matter of Spencer*, 228 U. S. 652, the reason for and the philosophy of the rule which excludes from review on habeas corpus any error that can be reached by writ of error were stated. This Court said (p. 663):

> The sentences imposed on petitioners were therefore not void, but erroneous only, and subject to change or modification by the (State) Supreme Court, or reversal, and the petitioners subject to resentence, and *Ex parte Lange*, does not apply. In *Re Lincoln*, 202 U. S. 278, habeas corpus was denied because there was an appeal from the judgment attached which could have been taken to the Circuit Court of Appeals, applying the rule which we have so often expressed, that the writ of habeas corpus is not to be used as a writ of error. And the reason is manifest. When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts; and if the judgment be excessive or illegal it may be modified or changed and complete justice done, as we have said, to the prisoner, and the penalties of the law satisfied as well.

On this point in *Ex parte Siebold*, 100 U. S. 371, this Court said (p. 375):

> This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange*, 18 Wall. 163, and *Ex parte Parks*, 93 U. S. 18. In the former case we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the

> judgment, whether erroneous or not, was not void because the court had jurisdiction of the case; and we refused to interfere.

While it may be admitted that to some extent a contempt case is *sui generis*, nevertheless it is governed by the general rules applicable to appeals and writs of error. Habeas corpus is not the method of review provided for contempt cases or any class of cases.

Ex parte Kearney, 7 Wheat. 38, a much-cited case, is an excellent illustration. There petitioner, called as a witness in the Circuit Court for the District of Columbia, refused to answer a question because he believed it tended to incriminate him. Having been ordered to answer, he refused to do so and was committed for contempt. He applied to this Court for habeas corpus.

Mr. Justice Story said (p. 42):

> It is also to be observed that there is no question here but that this commitment was made by a court of competent jurisdiction and in the exercise of an unquestionable authority. The only objection is, not that the Court acted beyond its jurisdiction but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the opinion of the Court, given in the course of a criminal trial, and thus asserting a right to control its proceedings, and take from them the conclusive effect which the law intended to give them. If this were an application for a habeas corpus, after judgment on an indictment for an

> offense within the jurisdiction of the circuit court, it could hardly be maintained that this Court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. There is, in principle, no distinction between that case and the present; *for when a Court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution;* and so the law was settled upon full deliberation, in the case of Brass Crosby, Lord Mayor of London (3 Wilson, 188). [Italics ours.]

Justice Story pointed out that the latter was a case of a person committed by the House of Commons for contempt, who sought relief by habeas corpus. He quotes Lord Chief Justice De Grey, who there said:

> The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this Court do? It can do nothing when a person is in execution by the judgment of a Court having a competent jurisdiction. In such a case this Court is not a court of appeal.

Mr. Justice Blackstone is also quoted as saying in the *Crosby case:*

> The sole adjudication of contempt, and the punishment thereof, belongs exclusively and without interfering to each respective court. *Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempt of others.* [Italics ours.]

Judge Story then concludes:

> So that it is most manifest, from the whole reasoning of the Court in this case, that a writ of habeas corpus was not deemed a proper remedy where a party was committed for a contempt by a court of competent jurisdiction; and that, if granted, the Court could not inquire into the sufficiency of the cause of commitment.

There has never been a suggestion in any report that this doctrine has been reversed or modified. On the contrary, this case has been cited often with approval. Its doctrine has been affirmed repeatedly and it is the law to-day.

Application to the case at bar.

The case at bar is plainly within the general rule. As has already been argued, the trial court that committed the Petitioner had jurisdiction of him, and of the offense, and the sentence was authorized by Section 268 of the Judicial Code.

Judge Manton accepted the contentions of the petitioner in two respects. He placed an innocuous interpretation upon the letter which was the basis of the contempt charge, and he decided that there was nothing pending *sub judice* when the letter was published. *That is, he reversed Judge Mayer's findings of fact, and made contrary findings.* For these reasons he concluded that the trial court had no jurisdiction to punish the appellee for contempt. It is respectfully submitted that neither matter was jurisdictional and

therefore both were outside the Court's province on habeas corpus.

That the first of these propositions could not be considered on habeas corpus has already been made clear. The sufficiency of the evidence is not before the Court. It is clearly distinguished from jurisdictional questions.

> *Harlan* v. *McGourin*, 218 U. S. 442, and the other cases cited above.

If the proposition might properly be argued here, it could readily be maintained and could easily be demonstrated that a publication was contemptuous which charged the trial court, in the midst of a protracted receivership, with denying public officials the opportunity to ascertain the truth (p. 54, fol. 162), with the "monstrous" offense of standing between the public and the truth (p. 55, fol. 164), with forcing public officials into a contest with corporate powers entrenched in darkness and concealment (p. 55, fol. 165), and with responsibility for turmoil, delay, and dissatisfaction resulting from various orders of the Court (fol. 165). It is respectfully suggested that the rule laid down by Judge Manton, that when the language used is not *per se* libelous, the intention of the offending party is a factor and may control (p. 26, fol. 78), is not the law. Even if it were, the intention of the accused would be a question for the trial court to consider. It has nothing to do with jurisdiction.

As to the contention that there was nothing pending *sub judice* at the time of the publication,

if it be assumed that this is an essential element of the crime, it is to be determined, like every other element, by the trial court. The determination of that Court, if erroneous, might be corrected on writ of error.

If we were at all concerned with that question here (and we are not), it might be pointed out that the contemptuous criticism was not limited to a single past order, but referred to a continuing policy in the receivership, which was undoubtedly pending (fol. 158), to many orders made in that receivership (fols. 162, 165) and the writer sought to procure the entry of other orders in the future (fol. 166). This question was carefully considered and effectively disposed of by the trial court in its opinion. (Vol. II, fols. 2480–2491.)

(c) *The exceptions to the general rule as to the scope of habeas corpus do not include the case at bar.*

There are only five classes of cases in which the Court on habeas corpus will go beyond the question of jurisdiction. These are the five exceptions:

1. Where there is a conflict of jurisdiction between a State and the United States.

2. Where the authority and operations of the Federal Government are or may be interfered with by State action.

3. Where rights or obligations of the United States under a treaty are involved.

4. Where the petitioner is held under State process based upon a State law which is in violation of the Constitution of the United States.

5. Where the judgment or order under which he is held is a nullity because in excess of the power of the Court.

This classification is based upon an analysis of *Henry* v. *Henkel*, 235 U. S. 228–229, and the cases there cited:

> But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court.

The first and second exceptions are closely related. The fundamental reason for the first four exceptions is the necessity of employing habeas corpus in order expeditiously and adequately to maintain the supremacy of Federal laws and treaties in compliance with Section 2 of Article VI of the Constitution. (See *Tarble's case*, 13 Wall. 397, 406–407, 410–411; *Tennessee* v. *Davis*, 100 U. S. 257, 262; *Cunningham* v. *Neagle*, 135 U. S. 1, 73; *In re Watts*, 190 U. S. 1, 27.)

Illustrations of the first and second exceptions are *In re Loney*, 134 U. S. 373, explained in *New York* v. *Eno*, 155 U. S. 89, 96–97; *Tarble's case*, *supra*; *Boske* v. *Comingore*, 177 U. S. 459, 466–467; *Cunningham* v. *Neagle*, *supra*, and possibly *In re Watts*, *supra*, hereinafter discussed. These are cases of urgency.

The third exception, essential to assure the fulfillment of treaty obligations and the proper conduct of foreign relations, is illustrated *In re Mayfield*, 141 U. S. 107, and is commented upon in *Ex parte Royall*, 117 U. S., at pages 251–252; *Cunningham* v. *Neagle*, 135 U. S., at page 74; *Boske* v. *Comingore*, 177 U. S., at page 466; and *Re Lincoln* 202 U. S., at pages 180–182.

As to the fourth exception, under which the validity of State laws, claimed to infringe the Federal Constitution, is sometimes tested on habeas corpus, *Ex parte Royall*, 117 U. S. 241, 247–250, 252–253, is the best example. The power of the Court in this class of cases is purely discretionary. In the *Royall case* the Court declined to exercise it on behalf of the petitioner. This subject is also discussed and the cases are collected in *Re Lincoln*, 202 U. S., at pages 180–182.

In these four exceptional classes of cases the writ of habeas corpus is employed whenever the Federal Courts are confronted with the duty of maintaining the supremacy of the laws, the treaties, and the Constitution of the United States against attack by the States. The applicant for the writ in these cases has no absolute right to it, except where it is expressly given by statute. The granting of this extraordinary relief rests in the Court's discretion and is exercised sparingly and only in an emergency.

Examples of the fifth exception, which may be called cases involving excess of power, are *Ex parte Lange*, 18 Wall. 163, 175–177; *Hans Nielsen, petitioner*, 131 U. S. 176; and *Ex parte Hudgings*, 249 U. S. 378. The petitioner strives to bring himself within this exception.

The *Hudgings case* was entirely *sui generis*. It stands alone. The District Judge, while presiding at a trial, formed the opinion that a witness, then testifying, had committed perjury by asserting and reiterating that he could not recall having seen certain persons write, although he had frequently associated with them. Thereupon, without any charge being preferred, without any proof of guilt being offered, without any evidence, without any hearing or any kind of legal proceeding, the Court ordered the imprisonment of the witness for contempt by the commission of perjury, for an indefinite term and until he should purge himself of the alleged contempt by testifying flatly the reverse of what he had stated to be the truth. Under these extraordinary circumstances, possibly in the exercise of its supervisory jurisdiction over District Courts, this Court, after hearing and leave granted on a rule to show cause, received a petition for habeas corpus, and reviewed the action of the District Court.

In doing so, it placed a salutary and undoubtedly a necessary restriction upon the power of the Courts to punish for perjury as contempt, which was being rather broadly construed by some of the lower

Courts. At the same time Chief Justice White stated that the case was exceptional (p. 384):

> In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, *we are of opinion that the case is an exception to the general rules of procedure* to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the question in the proceeding for habeas corpus which is before us. It is therefore ordered that the petitioner be discharged. [Italics ours.]

There is no analogy in the *Hudgings case* to the case at bar. The offense of the petitioner here occurred on October 6, 1919. The intervening time between that date and this has been consumed in legal proceedings of a most thorough and deliberate nature.

An information that was informing of the charge in the fullest sense was filed, and an order to show cause was served upon the appellee. Objections to the jurisdiction were made, fully heard, and fully argued. A demurrer and a motion to quash were exhaustively argued. These matters occupied several months. After they had been disposed of, the defendant pleaded. Still later he was tried, the trial lasting many days. Briefs on the various

questions raised were submitted and considered. Finally, on February 24, 1921, sentence was passed on the appellee, and the habeas corpus proceedings that eventuated in this appeal began the same day.

The trial court had made the fullest inquiry into all the facts, a great amount of proof was received, and many questions of law and fact were decided. Can it be said that a course of legal procedure so deliberate and thorough, even though we assume for the sake of argument that it was pursued in error, presented an emergency which called for a remedy of exceptional expedition? Was there anything in it that required departure from the ordinary procedure and dispensed with a writ of error?

A consideration of the charge made against the petitioner, especially that part of which specifically alleges that the publication tended to obstruct the administration of justice (fols. 176–178) and of the trial court's finding that the tendency and effect of the publication were to obstruct the administration of justice (fols. 2481–2485, 2490–2491, 2507), will serve further to differentiate the *Hudgings case* from the case at bar.

Ex parte Lange, 18 Wall. 163, is another exceptional case of this type, which was cited by Judge Manton. There the sentence was imposed under a statute that authorized fine or imprisonment. The Court inadvertently imposed both fine and imprisonment. The defendant paid the fine. After he had done so and had been five days in jail, the Court changed its judgment by imposing the im-

prisonment alone. The fine had passed into the treasury. Under these circumstances it was held that the defendant had suffered one of the alternative punishments provided by the statute, the fine, and it was beyond the power of the Court to impose the other punishment.

In its opinion this Court reaffirmed the principle that it could not review on habeas corpus an erroneous judgment. It concluded, however, that the judgment was not merely erroneous but absolutely void (pp. 175–176).

Hans Nielsen, petitioner, 131 U. S. 176, has also been cited as a case of excess of power. That was an appeal to the Supreme Court from a final order of the District Court denying habeas corpus. The ground of the application was that the defendant, having suffered one term of imprisonment for a crime, was sentenced to serve another term for the same offense. The Court reaffirmed the general principle limiting the scope of habeas corpus, but treated the case as an exception (p. 182). It held that the judgment was void for lack of power to render it (pp. 183–185, 190).

Counsel for petitioner in the court below cited a number of exceptional cases as authorities for the action taken in the case at bar. One of these, *Ex parte Bridges*, 2 Woods, 248; 4 Fed. Cases, No. 1862, pages 98, 103, 105, was substantially identical in facts with the *Loney case*, 134 U. S. 372, heretofore used by us as an illustration of the second exception.

Bridges was indicted in a State court for perjury committed before a United States Commissioner.

He was discharged on habeas corpus upon the ground that the offense was a Federal one cognizable only by the Federal courts and that the State court had no jurisdiction (p. 105).

In re Mayfield, 141 U. S. 107, was also cited. It plainly comes within the third exception. Mayfield was accused of crime committed in the Indian country. The Supreme Court discharged the petitioner from custody upon the ground that as a member of the Cherokee Nation, under a treaty of that Nation with the United States and under the Acts of Congress, he was amenable only to the tribunals of his Nation, and the United States District Court, which held him, had no power to do so.

In re Watts and Sachs, 190 U. S. 1, was another case cited by counsel for the petitioner. *There the Supreme Court intervened by certiorari and habeas corpus in a conflict between State and Federal Courts and the case was heard on a bill of exceptions.* Apparently, therefore, the Court took jurisdiction by certiorari, and employed habeas corpus in aid of its jurisdiction, for the purpose of enlarging the prisoners. Assuming, however, that the case were one of habeas corpus alone, it is essentially different from the case at bar, and the rule there applied is inapplicable here.

There was a direct conflict between the State and Federal Courts, each claiming jurisdiction over the same subject matter. Both had jurisdiction. The question was, which was paramount. Both

were subordinate to the United States Supreme Court, which has for such purposes general supervisory jurisdiction. The case is therefore within the first exception.

There is another situation sometimes occurring on habeas corpus that it may be suggested constitutes an exception to the general rule. It is not an exception, but if it were, it could have no application to the case at bar. Where there is a lack of jurisdiction in the lower court or its judgment is void, an appellate court, *authorized to review its action on writ of error*, may grant relief by habeas corpus, instead of remitting the applicant to his remedy by writ of error. (*Ex parte Siebold*, 100 U. S. 371.) But such power can be exercised, as is clearly shown in the *Siebold case*, only by a court having supervisory jurisdiction, from which a writ of error would lie, and only when the judgment assailed is void (100 U. S. at page 375). (See also *Matter of Spencer*, 228 U. S. 652, 653.)

As heretofore indicated, the enumerated exceptions are merely the instances in which, because of the absence of other forms of remedy, it is necessary to resort to habeas corpus in order to assure the rights of persons restrained of liberty and are in effect mere interpretations of Section 753 of the Revised Statutes. A survey of the illustrations of the exceptions mentioned above shows clearly that, save, possibly, as to the first, they occur where the sentencing court was either entirely without or exceeded its jurisdiction.

It seems manifest that the case at bar is not embraced within any of these exceptions. However erroneous—if erroneous at all—may have been the rulings of the District Court, the procedure was regular and in conformity with settled practice with respect to subject matter of which that Court had jurisdiction. There was no conflict in jurisdiction between the State and Federal authorities; there was no State interference with the operations of the general government; no treaty was involved; the constitutionality of no State law was assailed; the power of the Court under Section 268 of the Judicial Code was not exceeded; and Judge Manton was not an appellate court, authorized to review, by writ of error or otherwise, the action of the District Court.

IV.

Since the Circuit Court was abolished, a Judge of the Circuit Court of Appeals has no power to grant the writ of habeas corpus.

The Circuit Court of Appeals in deciding this case (282 Fed. 138; Record, p. 1131) considered three questions:

> 1. The power of a Judge of the Circuit Court of Appeals to grant or to issue a writ of habeas corpus.
>
> 2. Whether or not the paper signed by Judge Manton and described as a writ of habeas corpus was in reality such a writ.
>
> 3. Whether the case was one within the power of a court to review by habeas corpus.

The latter question has already been discussed.

(a) *The power of a Circuit Judge to issue or grant the writ of habeas corpus.*

In his opinion Judge Rogers discusses this question at length and reaches the conclusion that since the Circuit Court was abolished a so-called Circuit Judge or Judge of the Circuit Court of Appeals as such has no power to grant a writ of habeas corpus. His reasoning seems to us to be conclusive, and of course no Judge is disposed lightly to limit his own power or authority. The argument briefly runs as follows:

The issuance of the writ of habeas corpus is governed by Sections 751 and 752 of the Revised Statutes, which provide:

> SEC. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus.
>
> SEC. 752. The several Justices and Judges of the said Courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

It is to be noted that under Section 751 the power to *issue* the writs is given to the named *courts*, while the power given by Section 752 to the several Justices and Judges of the "said courts" is to *grant* the writs; that is, to direct that the writs *issue* out of the Courts.

The Circuit Courts were established by the Judiciary Act of 1789. (1 Stat. 74, Sec. 4.) It was eighty years later that the office of Circuit Judge was established by Section 2 of the Act of April 10,

1869. (16 Stat. 44.) (See *Bunn, United States Courts*, pages 37, 38, 40, and 41.)

The Act of 1869 conferred on the Circuit Judge for his Circuit "the same power and jurisdiction therein as the Justice of the Supreme Court allotted to the Circuit," commonly called a Circuit Justice. This was continued by Section 607 of the Revised Statutes down to the adoption of the Judicial Code.

By the Act of March 3, 1911, abolishing the Circuit Court and transferring its powers to the District Court, there were repealed in explicit terms Section 607 of the Revised Statutes and all statutes of date prior to February 1, 1911, authorizing the appointment of Circuit Judges.

Act of March 3, 1911 (Judicial Code), 36 Stat. 1087, §§ 289, 291, 297.

The language of Section 297 of the Judicial Code on this subject is this:

> SEC. 297. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed, * * * Sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; * * *.
>
> All Acts and parts of Acts authorizing the appointment of United States Circuit and District Judges, * * * enacted prior to February first, nineteen hundred and eleven.

The consequences of these repealing provisions are that (1) all appointments of Circuit Judges made since 1911 have been exclusively under the authority of the Judicial Code; and (2) all Circuit Judges

have been deprived of the powers of a Circuit Justice which they had exercised prior to 1912.

It follows that the only sources to which we can go to ascertain whether a Circuit Judge now has, or since 1911 has had, authority to issue a writ of habeas corpus are the Judicial Code and Section 752 of the Revised Statutes.

The Judicial Code, Sections 117 and 118, confers no authority on a Circuit Judge to issue an original writ of habeas corpus. Except when he holds the District Court by assignment or sits under some special statute like the Expedition Act of February 11, 1903 (32 Stat. 803), the sole functions of a Circuit Judge are as a member of the Court of Appeals and are distinctly appellate. (See *Whitney* v. *Dick*, 202 U. S. 132; *McLish* v. *Roff*, 141 U. S. 666; *Lau Ow Bew* v. *United States*, 144 U. S. 55–56.)

Reverting now to Sections 751 and 752 of the Revised Statutes, it will be noted that the power conferred by Section 752 is upon "the several justices and judges" of "the Supreme Court and the Circuit and District Courts." No power is conferred by this section on a Circuit Judge, *qua* Circuit Judge. Who, then, were the Judges of the Circuit Court embraced within the language of Section 752 during the period of the existence of that Court?

From 1789 to 1869 they were only the Circuit Justices and District Judges. (Judiciary Act of 1789, Sec. 4; 1 Stat. 74.) From 1869 to 1911 they were these and the Circuit Judges, as shown by Section 609 of the Revised Statutes, which provided

that Circuit Courts "shall be held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the said judges sitting together."

When the statutes conferring on Circuit Judges the authority to hold Circuit Courts (Revised Statutes, Sec. 609), and the powers of Circuit Justices (Sec. 607) were expressly repealed by the Judicial Code, of necessity Circuit Judges ceased, within the meaning of Section 752 of the Revised Statutes, to be Judges of the Circuit Court. This would be true even though the Circuit Courts had continued to exist after 1911. It would seem the more particularly obvious as to Circuit Judges appointed subsequent to 1911 who, because of the abolition of the Circuit Courts, were never Judges of any Circuit Court.

There was never conferred on any Circuit Judge, *qua* Circuit Judge, the power to issue a writ of habeas corpus. There is no such thing as a Judge of an abolished court. There can be no power in a Judge as a Judge of that court after the court itself has ceased to exist.

The effect of the Judicial Code having been to merge the Circuit Court into the District Court, if any power of the Judge of the Circuit Court after 1911 continued by force of Section 752 it passed by virtue of the merger to the Judge of the District Court.

It is doubtless true that prior to the abolition of the Circuit Courts and the repeal of Sections 607 and 609 of the Revised Statutes in 1911 the language of

Section 752 was sufficient, as said in *Fong Yue Ting* v. *United States*, 149 U. S. 698, to include all Judges of the United States. Prior to the Judicial Code the judicial officers of the Supreme, Circuit, and District Courts, who under then existing laws could be assigned to hold Circuit and District Courts, composed the entire Federal judiciary; but it by no means follows that after the Circuit Court and the authority of a Circuit Judge to hold the Circuit Court were expressly abolished, the expression "Judge of the Circuit Court" continued to include a Circuit Judge. The source of the authority having ceased, the authority itself necessarily terminated.

There being other ample provision for judicial inquiry into the restraints of liberty, there is no cause to construe Section 752 of the Revised Statutes as authorizing Circuit Judges to grant writs of habeas corpus in order to prevent failure of constitutional guaranty against suspension. *Whitney* v. *Dick*, 202 U. S. 132, 135; *Matter of Tracy*, 249 U. S. 551.

In *Whitney* v. *Dick*, this court distinctly held that, the Court of Appeals Act not providing in terms authority for that Court to issue a writ of habeas corpus as an original and independent proceeding, it had no power so to do.

(b) *The so-called writ of habeas corpus was void.*

The paper signed by Judge Manton which constituted the so-called writ of habeas corpus appears on page 32 of the Record. It is not addressed to

anybody, it bears the seal of no court nor the signature of the Clerk, and is merely signed "Martin T. Manton, U. S. C. J." Judge Rogers comments upon this (282 Fed. 145, Record pp. 1141, 1142), and holds that the writ of habeas corpus, like the writs of error, certiorari, and mandamus, should be issued under the seal of the court; that in the United States, the writ always runs, in Federal Courts, in the name of the President of the United States, and, in the State Courts, in the name of the State or of the people, citing *Church on Habeas Corpus*, 2d ed., sec. 110; while in the present case, the writ did not run either in the name of the President or in that of anybody else, and was not addressed to the United States Marshal or to anybody else. He concludes, however, that regardless of what validity the original writ possessed it appears to have been treated by all parties as valid.

Judge Hough, in his concurring opinion (282 Fed. 153, Record, pp. 1159, 1160), also discusses the question and reaches the conclusion that the so-called writ was a nullity, but joins the other members of the court in considering the matters argued, as though the Circuit Judge, authorized to hold and holding a District Court, had allowed the writ of habeas corpus to issue out of that Court and, upon the return of the writ, had directed the relator to be discharged.

In passing, it may be noted that Section 911 of the Revised Statutes provides that all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue,

and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence, and those issuing from a District Court shall bear teste of the judge, or, when that office is vacant, of the clerk.

V.

The order of Judge Manton was appealable to the Circuit Court of Appeals.

It is obvious that the procedure adopted by the petitioner was intended to involve the case in as many technicalities as possible, and to prevent, if possible, a review of the merits by any appellate court. This was shown at the outset by refraining from suing out a writ of error, and instead thereof resorting to habeas corpus. He evidently had in mind the procedure followed in the case of *Carper* v. *Fitzgerald*, 121 U. S. 87 *infra*. Having in mind, also, the possibility of an adverse decision upon the power of a Circuit Judge to issue the writ of habeas corpus, he took the precaution to fortify his position by the fact that Judge Manton was at the same time holding by designation a term of the District Court. Having succeeded in procuring a favorable decision from Judge Manton, he claims that the order made was not appealable to a Circuit Court of Appeals because it was a Judge's order and not a Court order. Throughout the proceedings before

Judge Manton he was unwilling to commit himself, but having won, he took the position before the Circuit Court of Appeals, and now, that the order was not appealable. In other words, if necessary to sustain jurisdiction, Judge Manton was sitting in the District Court, but to prevent review on appeal, he was sitting as a Circuit Judge.

The Circuit Court of Appeals refused to be misled by such reasoning and regarded the order discharging the petitioner from custody as an order of the District Court, made by a Judge sitting in that Court, and therefore appealable. (282 Fed. 145; Record, p. 1141.) This conclusion, we submit, is sound in view of the facts shown by the record, already stated, and it is unnecessary to add anything to the reasoning of the Judges of the Circuit Court of Appeals.

Even though the order be regarded as a Judge's order, it was nevertheless appealable.

An appeal lies from the order of a judge to the Circuit Court of Appeals.

Webb v. *York*, 70 Fed. 753.
United States v. *Fowkes*, 53 Fed. 13.
Duff v. *Carrier*, 55 Fed. 433.
In re Starr, 56 Fed. 142.

The case of *Webb* v *York*, *supra*, was decided by the Circuit Court of Appeals for the Eighth Circuit May 18, 1896, and that court held that it had jurisdiction of an appeal from the final decision of a district judge at Chambers in a habeas corpus case

as well as from the final decision of the District Court. In that case the court said:

> Prior to the act of March 3, 1891, creating Circuit Courts of Appeals (26 Stat. 826, c. 517), an appeal lay from such orders to the Circuit Court for the district by virtue of section 763, Rev. St. U. S., which reads as follows:
>
> "SEC. 763. From the final decision of any court, justice, or judge inferior to the Circuit Court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the cause is heard. * * *"
>
> In the case of *U. S.* v. *Fowkes*, 3 U. S. App. 247, 3 C. C. A. 394, 53 Fed. 13, it was held that the act of March 3, 1891, supra, operated to divest the Circuit Courts of their appellate jurisdiction in habeas corpus cases, under section 763, and that by virtue of the provisions of the act of March 3, 1891, the various Circuit Courts of Appeals had acquired the jurisdiction to review the decisions of District Courts in habeas corpus cases that had previously been exercised by the Circuit Courts. This conclusion, we think, was fairly warranted by the following clause of section 4 of the act of March 3, 1891, to wit:
>
> "SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals, by writ of error or otherwise, from said District Courts

> shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established. * * *"
>
> (See also *Duff* v. *Carrier*, 5 C. C. A. 177, 55 Fed. 433.)

The court reasoned that unless the Act of March 3, 1891, is construed as lodging in the Circuit Courts of Appeals the appellate jurisdiction under section 763, the right of appeal granted by that section was lost, because no court had been designated in which appeals in such cases might be taken. The fact that the right of appeal was not abolished in so many words furnished a persuasive inference that Congress intended to designate a court to hear and determine such appeals, citing *McLish* v. *Roff*, 141 U. S. 661, and *Lau Ou Bew* v. *United States*, 144 U. S. 47, as authority for the proposition that it was the purpose of the Act of March 3, 1891, to distribute the entire appellate jurisdiction theretofore exercised by the Federal courts between the Supreme Court and the Circuit Courts of Appeals. The court held that it was the intention of Congress to confer on the Circuit Courts of Appeals the right to hear appeals from final orders made by district judges in habeas corpus cases as well as to hear appeals from final decisions of District Courts made in such cases and said: "We can conceive of no reason why the right should be denied in the one case and granted in the other, and such we believe was not the intent of the lawmaker." The reasoning in that case is upheld in the other case cited.

United States v. *Fowkes*, 53 Fed. 13, decided by the Circuit Court of Appeals for the Third Circuit November 10, 1892, held that under the Act of March 3, 1891, the Circuit Courts of Appeals have succeeded to the appellate jurisdiction of the circuit courts under section 763 of the Revised Statutes, for if an appeal could before the creation of the Circuit Court of Appeals have been taken to the Circuit Court it was now cognizable by the Circuit Court of Appeals as the lawful successor of that court with respect to such appellate jurisdiction.

The case of *Carper* v. *Fitzgerald*, 121 U. S. 87, held that there was no appeal from an order of a circuit judge as distinguished from a Circuit Court to the *Supreme Court*, but the question of appealability to the Circuit Court of Appeals was not involved. That case was decided in 1887, when there were, of course, no Circuit Courts of Appeal and, as pointed out by the court, the Act of March 3, 1885, c. 353, 23 Stat. 437, gave an appeal to the Supreme Court, in habeas corpus cases, only from the final decision of a Circuit Court.

The Act of March 3, 1885, referred to by the court, amended section 764 of the Revised Statutes. When that Act was passed, section 763 of the Revised Statutes authorized an appeal to the Circuit Court from the final decision of any "court, justice, or judge inferior to the Circuit Court" upon application for a writ of habeas corpus or upon such writ when issued (1) in the case of a person alleged to be restrained of his liberty in violation of the Constitution

or any law or treaty of the United States and (2) in the case of a prisoner who, being a subject or citizen of a foreign State and domiciled therein, is in custody by or under the authority of law of the United States or any State, etc., the validity and effect whereof depended upon the law of nations, etc.

Section 764, prior to the Act of March 3, 1885, provided "from the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described *in the last clause* of the preceding section."

The Act of March 3, 1885, amended section 764, so as to provide that "from the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described *in the preceding section*."

Carper v. *Fitzgerald*, therefore, did not hold that an order made by a circuit judge was not appealable to the Circuit Court to which an appeal could theretofore have been taken under section 764, but that the amendment of 764 did not allow the appeal to be taken to the Supreme Court. Nor did *McKnight* v. *James*, 155 U. S. 685, hold that an order of the circuit judge was not appealable. The court in that case, referring to its decision in *Carper* v. *Fitzgerald*, distinctly recognized the difference between appeals to the *Circuit Court* from the decision of a court, justice, or judge inferior to that court and an appeal from that *court* to the *Supreme Court*.

The broad wording of section 6 of the Circuit Court of Appeals Act, 26 Stat. 826, although it did not expressly provide for an appeal to the Circuit Court of

Appeals from the order of the judge, has been construed to authorize such an appeal. *United States* v. *Gee Lee*, 50 Fed. 271; C. C. A. 9th Circuit, April 18, 1892. There a district judge had reversed the order of the Commissioner deporting a Chinese person. An appeal was taken from the judge to the Circuit Court of Appeals. The Act under which the appeal from the Commissioner was taken (sec. 13, Act of September 13, 1888, 25 Stat. 479) authorized such an appeal to the "judge of the District Court for the district." The court, after considering section 6 of the Act of 1891, creating the Court of Appeals and providing that it should exercise appellate jurisdiction to review by appeal or writ of error final decisions of a District Court in all cases other than those provided for in the preceding section, held that the words "judge of the District Court" might properly be regarded as the equivalent for the "District Court," and that a writ of error would lie to review the judgment. The court said:

> We are of the opinion that the statute should be so read. The learned Judge of the District Court, from the allowance by him of the writ of error, evidently so thought. Every argument of utility and convenience favors this conclusion. Uniformity of decision in a very important matter will thus be secured.
>
> "Judge of the District Court" and "District Court" are not, strictly speaking, convertible terms. But they are so in a popular sense,

and it is safe to assume that Congress, in the use of the former phrase, in this connection, intended to give the party an appeal to the District Court of the District.

VI.

The judgment of the Circuit Court of Appeals was correct and should be affirmed.

It may be that this brief has been extended to inordinate length, but the case presents, as we have heretofore stated, questions of great importance in the administration of the criminal law.

Misuse of the writ of habeas corpus is becoming increasingly prevalent. Two conspicuous instances came before this Court the last term, *Lamar* v. *United States* (January 29, 1923) and *Riddle* v. *Dyche* (May 21, 1923). Several more are on the present docket. This Court has again and again condemned the practice of substituting a habeas corpus for a writ of error, or utilizing it as a second writ of error, but some members of the bar still share the view of Sam Weller that "the have-his-carcass next to perpetual motion is vun of the blessedest things as was ever made." There is this important difference in the analogy, for Mr. Weller used the famous writ to get into the Fleet to help Mr. Pickwick, while too many lawyers still feel that the writ may be used to keep out of prison men who have offended the law, had their day in court, and been fairly convicted. After all this Court has said about the difference between writs of error and writs of habeas corpus, it is nevertheless becoming more and more difficult to execute

a sentence after conviction of the criminal. There seems to be no finality. After conviction, and even after an affirmance upon writ of error, some so-called constitutional question is conjured up by superacute ingenuity of counsel, upon which relief by writ of habeas corpus is sought, and whether the writ is sustained or dismissed, the offender is admitted to bail, an appeal is taken, and the whole process of bringing it finally to this court begins anew. In the meantime the salutary value of a vindication of the Court's dignity and authority is largely lost, at least so far as the public mind is concerned, by inordinate delay.

This record presents the situation in a most aggravating form. Not only was there no attempt to review the conviction in the orderly manner prescribed by law, but, by deliberate avoidance of that method, an appeal to another Judge was substituted, and the attempt was made to shape the proceedings so that no review of his decision could be had. The result has been intolerable delay, great and unnecessary expense, and an offender against the administration of justice still unpunished. Under the habeas corpus method the question of the guilt or innocence of the accused fades away, and the question of the authority and jurisdiction of the courts takes its place. The Judge and not his contemnor is thus put on trial. The offense took place four years ago and may have been forgotten by many people in the City of New York, but the vital question of the capacity of the

courts of the United States to maintain their authority through the orderly procedure prescribed by law still remains to be decided.

We ask this Court to affirm the judgment of the Circuit Court of Appeals and to hold that the District Court held by Judge Mayer had jurisdiction to entertain the complaint against Craig and to try him, convict him, and sentence him; that Judge Manton, whether he acted as a Circuit Judge or as a Judge sitting in the District Court, had no right to free him upon habeas corpus; that the order which he made, whether it be considered a Judge's order or a Court order, was appealable to the Circuit Court of Appeals; and that in reversing that order the Circuit Court of Appeals did right.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

OCTOBER, 1923.

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CRAIG *v.* HECHT, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 82. Argued October 17, 1923.—Decided November 19, 1923.

1. A circuit judge, as such, has no power to grant the writ of *habeas corpus*. P. 271.
2. A final order discharging a petitioner in *habeas corpus*, made at chambers by a circuit judge exercising by designation the power of the District Court, or by a district judge, is reviewable on appeal by the Circuit Court of Appeals. P. 274.
3. In an ordinary contempt proceeding the District Court has jurisdiction to decide whether the evidence established an offense within the statute and whether the respondent was guilty as charged, and its order sentencing him to imprisonment is reviewable by appeal, and not by *habeas corpus*, which cannot be used as a substitute for appeal, in the absence of exceptional circumstances. P. 277.

282 Fed. 138, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing an order in *habeas corpus* which discharged the petitioner, Craig, from custody under a commitment issued by the District Court in a contempt proceeding. The order of discharge was made by a circuit judge, assigned to the District Court, who directed that it be recorded in that court.

Mr. Edmund L. Mooney, with whom *Mr. George P. Nicholson, Mr. Charles T. B. Rowe, Mr. Frank I. Tierney*

and *Mr. Russell Lord Tarbox* were on the brief, for petitioner.

I. The district court acted beyond its jurisdiction, because petitioner's act was not "misbehavior," and did not, and could not, "obstruct" the administration of justice.

II. The circuit judge had jurisdiction to issue the writ of *habeas corpus*. The mere fact that a court is merged does not deprive the judge, whose office still continues, of any jurisdictional power vested in him, *qua* judge. By the Habeas Corpus Act of 1867, 14 Stat. 385, the authority to issue the writ was vested in the "several courts of the United States and the several justices and judges of such courts within their respective jurisdictions," and subsequently, on the appointment of circuit judges, by the Act of April 10, 1869, 16 Stat. 44, and the still later codification in the Revised Statutes, the jurisdiction to issue the writ was vested in "the Supreme Court and the circuit and district courts," Rev. Stats., § 751, and upon "the several justices and judges of the said courts," *id.*, § 752; and again by §§ 754, 755, 757, 758, 760–763, the jurisdictional power of the justices and judges is repeated. These justices and judges are described in the Revised Statutes as "the several justices and judges of the said courts," but since they were in fact "Justices of the Supreme Court," and "circuit judges" and "district judges," this was but a short way of describing the officers in whom was vested the jurisdictional authority. The statute might as well have read, and, in the ordinary vernacular, would have read "the Justices of the Supreme Court, the circuit judges and the district judges," or "United States judge," as in § 6 of the Chinese Exclusion Act of 1862, or "judge of the United States," as in § 1014, Rev. Stats., which would have had the same meaning as the words actually employed. The object and purpose of the applicable provisions of the Judicial Code were to get

rid of superfluous courts, court officers and records, not to circumscribe the jurisdictional power of the judges. *Whitney* v. *Dick*, 202 U. S. 132, distinguished.

The jurisdictional powers of the court and those of the judge are distinct. *United States* v. *Clarke*, 1 Gall. 497. The reluctance of a judge to discharge a person committed by a judge of coördinate jurisdiction, *In re Hale*, 139 Fed. 496, would not apply in the same degree to a circuit judge reëxamining the act of a district judge. The only "other and appropriate sources of judicial power," *Ex parte Tracy*, 249 U. S. 551, are Justices of the Supreme Court and the Supreme Court itself, which should be relieved of such applications whenever possible.

The policy of the United States has been in the direction of extending and not of abridging the advantages of the writ of *habeas corpus*. The Constitution provides that "the privilege of the writ . . . shall not be suspended." *Ex parte Milligan*, 4 Wall. 2. This policy is further evidenced by the acts of Congress in conferring wide jurisdiction. Judiciary Act September 24, 1789, § 14; *Ex parte Bollman*, 4 Cr. 75; Act March 2, 1833, § 7, 4 Stat. 634; Habeas Corpus Act February 5, 1867, 14 Stat. 385; *Ex parte McCardle*, 6 Wall. 318; *Whitney* v. *Dick*, 202 U. S. 132, 136. When the circuit judges were appointed under the Act of 1869, *supra*, there was conferred upon them all of the powers of Supreme Court Justices within their respective circuits, one of which was the power to issue writs of *habeas corpus*, which always inhered in the office of Supreme Court Justice. The circuit judges received a baptism of power to issue this writ at the moment of their appointment; and this power did not originate in or spring from the panoply of a court.

The Act of 1869, providing for the appointment of circuit judges, was reënacted in substance in § 607, Rev. Stats. The Habeas Corpus Act of 1867 was transposed

into §§ 751, 752, Rev. Stats. This revision of the language of the Habeas Corpus Act, without any apparent intention to change its effect, brought about no substantial change in the law, so that the specification of the several courts of the United States as "the Supreme Court and the circuit court and district courts" meant substantially what it did in the first place in the Habeas Corpus Act, namely, that the power was conferred upon the "several justices and judges of the said courts," to wit, the Supreme Court and the District Courts, as expanded by the Act of 1869, appointing circuit judges and giving them the same power, within their jurisdiction, as Supreme Court Judges. There never has been an express change in the Habeas Corpus Act of 1867, except in its revision by the Revised Statutes. The *habeas corpus* provisions remain exactly as they were.

It is an "elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible." *Ex parte United States*, 226 U. S. 420. This Court has shown no tendency to restrict the "appropriate sources of judicial power" to issue the writ. *Ex parte Tracy*, 249 U. S. 551.

A very material consideration, we submit, is that when circuit judges were created no new court was created—the circuit court was already in existence. As the circuit judges did not derive their origin from a court, it is hard to see how they could lose any of their powers, as judges, by the abolition or merger of the court in which they usually sat.

The holding of the lower court is, in effect, that by the abolition or merger of the circuit court, the circuit judges were shorn of all of their powers—nothing was left to them except their bare titles—and that they were reclothed with the power, and only with the power, to sit

on the bench of the Circuit Courts of Appeals. We know, however, that they retained jurisdiction to sit under the Expedition Act, *Ex parte United States, supra;* and under the Chinese Exclusion Act of 1892, § 6. *Fong Yue Ting* v. *United States,* 149 U. S. 698. They are comprehended within the category of "any justice or judge of the United States" in § 1014, Rev. Stats., relating to the arrest and holding or bail of persons accused of crime. They also may, without designation, grant injunctions or restraining orders in cases pending in the district courts of their circuits (Jud. Code, § 264) and, upon designation by the President, act as a judge of the Court of Customs Appeals. Jud. Code, § 188. As the circuit judges retained these several powers as judges, under the separate acts conferring them, notwithstanding the abolition or merger of the circuit courts by the Judicial Code, how can it be said that they were, by the Judicial Code, shorn of the power conferred by the separate Habeas Corpus Act, unrepealed, to issue the great writ, which they had exercised in numberless instances covering over half a century?

It would be a violent assumption that in dispensing with the machinery of a court, Congress intended to strip the judges thereof of their own inherent powers, especially where the act was not to be "construed to prevent any circuit judge holding district court or serving in the commerce court, or otherwise, as provided for and authorized in other sections of this Act." Jud. Code, § 118. The exercise of this power by a circuit judge is well exampled in the leading case before this court of *Carper* v. *Fitzgerald,* 121 U. S. 87.

In the present case, Circuit Judge Manton was the regularly acting judge holding the chambers part of the district court, under designation, when the writ was issued. He was the judge before whom it was our duty to go and he was the judge whose business it was—using the word in its proper sense—to issue the writ.

But, though thus designated, the point of the jurisdiction and power of a circuit judge to issue a writ of *habeas corpus* is necessarily involved, for only by holding that a circuit judge had no such jurisdiction or power, and that the order was an order of the district court, did the court below assert jurisdiction to hear and decide the appeal, notwithstanding the petitioner's motion to dismiss the appeal.

III. In issuing the writ, the circuit judge, in addition to his powers as such, was exercising the powers of a district judge, under designation. *Ex parte United States*, 226 U. S. 420. His order was not a court order, but a judge's order. *Carper* v. *Fitzgerald*, *supra*.

It will be observed that § 18, Jud. Code, provides for designation of the circuit judge, but the following section does not limit the judge so designated to holding the court; it provides that "all the acts and proceedings . . . by or before him, in pursuance of such provisions, shall have the same effect and validity as if done by or before the district judge of the said district." The designation in this case follows the lines of the statute.

A circuit judge can no more lay aside his title and powers of circuit judge than could he be stripped of them; he is always a circuit judge. *McCarron* v. *People*, 13 N. Y. 74.

Even if this Court shall hold that a circuit judge has no power, as such, to grant a writ of *habeas corpus*, he may have the power, under Rev. Stats., § 752, whenever he is a judge of the district court. Where Congress has committed jurisdiction to a judge as a judicial tribunal, he functions through his own inherent power and not through or on behalf of the court of which he is a member. *United States* v. *Duell*, 172 U. S. 576; *Carper* v. *Fitzgerald*, *supra*.

IV. The decisions are uniform that no appeal lay to the Circuit Court of Appeals from an order of a judge; that

only an order of a court might be reviewed by appeal or writ of error. *Carper* v. *Fitzgerald, supra; In re Lennon,* 150 U. S. 393; *McKnight* v. *James,* 155 U. S. 685; *Lambert* v. *Barrett,* 157 U. S. 697; *Ex parte Jacobi,* 104 Fed. 681; *Harkrader* v. *Wadley,* 172 U. S. 148.

V. This Court had exclusive jurisdiction, by direct appeal, to review the order discharging the petitioner, which was based upon a finding that the petitioner had been deprived of his liberty by an excess of power, involving the construction and application of the Constitution. The assumption of jurisdiction by the Circuit Court of Appeals warrants and requires the intervention of this Court. Jud. Code, § 238; *Raton Water Works Co.* v. *Raton,* 249 U. S. 552, and other cases.

VI. If the Circuit Court of Appeals had no jurisdiction to review the order of a circuit judge, its determination should be reversed regardless of the question whether the district court acted in excess of its powers, and regardless, also, of whether *habeas corpus* was the proper remedy, leaving those questions to be reviewed by appropriate procedure. *First National Bank* v. *Chicago Title & Trust Co.,* 198 U. S. 280.

VII. *Habeas corpus* was the proper and effective remedy for excess of power or lack of jurisdiction in the commitment for asserted contempt. *Ex parte Hudgings,* 249 U. S. 378; *In re Watts and Sachs,* 190 U. S. 1; *Cuyler* v. *Atlantic & N. C. R. R. Co.,* 131 Fed. 95; *In re Reese,* 98 Fed. 984; *Ex parte Dock Bridges,* 2 Woods, 428; *Ex parte Lange,* 18 Wall. 163; *Ex parte Siebold,* 100 U. S. 371; *Ex parte Fisk,* 113 U. S. 713; *In re Ayers,* 123 U. S. 443; *Nielsen, Petitioner,* 131 U. S. 176; *Cuddy, Petitioner,* 131 U. S. 280; *In re Mayfield,* 141 U. S. 107; *Ex parte Robinson,* 144 Fed. 835; *Ex parte Bigelow,* 113 U. S. 328; *In re Belt,* 159 U. S. 95; *Hyde* v. *Shine,* 199 U. S. 62.

VIII. The disregard, by the court below, of the statutory proviso of punishment for obstructive misbehavior,

only, and the limitations sought to be placed by the court below on the scope of the writ of *habeas corpus*, are not in accord with the rulings of this Court. Jud. Code § 268; *Brass Crosby, Lord Mayor of London*, 3 Wilson, 188; *Ex parte Robinson*, 19 Wall. 505, referred to.

Ex parte Kearney, 7 Wheat. 38, and *Ex parte Watkins*, 3 Pet. 193, were decided before the Act of 1831 (now Jud. Code, § 268), which introduced the proviso of obstructive misbehavior as the basis of contempt, and are no longer applicable.

We freely concede that the writ of *habeas corpus* may not be employed as an anticipatory writ of error, such as was discountenanced in *Henry* v. *Henkel*, 235 U. S. 219; *Rumely* v. *McCarthy*, 250 U. S. 283, and similar cases. But generally the rule of procedure for which such cases stand is quite beside the right to attack by writ for lack of jurisdiction or excess of power. *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Siebold*, 100 U. S. 375; *United States* v. *Pridgeon*, 153 U. S. 48; *Ex parte Lange*, 18 Wall. 163; *Ex parte Hudgings*, 249 U. S. 378.

Even though the only question that the court on *habeas corpus* can look into is one of jurisdiction, broadly considered, the cases show that the court may look into the facts upon which the conviction was based, to the extent that they affect the jurisdiction of the court which assumed to make the adjudication. *In re Mayfield*, 141 U. S. 107; *Cuddy, Petitioner*, 131 U. S. 280.

IX. The objections raised to the form of the writ were unavailing to oust the circuit judge of power to act.

Mr. Solicitor General Beck, with whom *Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, was on the brief, for respondent,

I. The judgment of conviction rendered by the district court was final and conclusive until reversed on writ of error.

The court had jurisdiction of the person of the offender and of the offense, and the sentence imposed was within its power, both inherent and as confirmed by the statute. *Ex parte Robinson*, 19 Wall. 505; *In re Debs*, 158 U. S. 565; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402.

The authority conferred by Jud. Code, § 268, clearly embraced the offense. No issue of jurisdiction is left. The petitioner urged certain issues of law and fact as affecting the jurisdiction, but every one of these was open to review on appeal to this Court, as the judgment of conviction was unquestionably a final decision. Jud. Code, § 128; *Bessette* v. *Conkey Co.*, 194 U. S. 324. Assuming that the trial court's determination of every one of these questions was erroneous, none of them would be within the scope of *habeas corpus*. *Ex parte Watkins*, 3 Pet. 193; *Riddle* v. *Dyche*, 262 U. S. 333.

II. The matters litigated before Judge Manton did not involve the jurisdiction of the court which tried and sentenced the petitioner, and the proceedings amounted to a mere review on the merits for which an appeal was the proper remedy.

The law is that the findings of the trial court may not be attacked collaterally, nor can the record be examined to see whether there is evidence warranting a conviction. *Harlan* v. *McGourin*, 218 U. S. 442; *Ex parte Carll*, 106 U. S. 521; *In re Debs*, 158 U. S. 565; *Matter of Gregory*, 219 U. S. 210.

III. The writ of *habeas corpus* may not be used as a substitute for an appeal. The court on *habeas corpus* is limited to jurisdictional questions. *Glasgow* v. *Moyer*, 225 U. S. 420; *Matter of Gregory, supra; Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Harlan* v. *McGourin, supra.*

To warrant discharge on *habeas corpus*, the judgment, upon which the commitment is based, must be not merely

erroneous, but absolutely void. This proposition excludes from consideration any error, however vital or prejudicial it may be deemed. The remedy for error is by appeal. The cases on this proposition are so varied and so strongly stated as to leave no doubt of their purport or effect. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Spencer*, 228 U. S. 652; *Ex parte Siebold*, 100 U. S. 371.

While it may be admitted that to some extent a contempt case is *sui generis*, nevertheless it is governed by the general rules applicable to appeals and writs of error. *Habeas corpus* is not the method of review provided for contempt cases or any class of cases. *Ex parte Kearney*, 7 Wheat. 38.

The case at bar is plainly within the general rule. Judge Manton accepted the contentions of the petitioner in two respects. He placed an innocuous interpretation upon the letter which was the basis of the contempt charge, and he decided that there was nothing pending *sub judice* when the letter was published. That is, he reversed Judge Mayer's findings of fact, and made contrary findings. But the sufficiency of the evidence was not before him. It is clearly distinguished from jurisdictional questions. *Harlan* v. *McGourin*, 218 U. S. 442, and other cases cited above.

If the proposition might properly be argued here, it could easily be demonstrated that the publication was contemptuous.

As to the contention that there was nothing pending *sub judice* at the time of the publication, if it be assumed that this is an essential element of the crime, it is to be determined, like every other element, by the trial court. The determination of that court, if erroneous, might be corrected on appeal. If we were at all concerned with that question here (and we are not), it might be pointed

out that the contemptuous criticism was not limited to a single past order, but referred to a continuing policy in the receivership, which was undoubtedly pending, to many orders made in that receivership; and the writer sought to procure the entry of other orders in the future. This question was carefully considered and effectively disposed of by the trial court in its opinion.

The exceptions to the general rule as to the scope of *habeas corpus* do not include the case at bar. There are only five classes of cases in which the court on *habeas corpus* will go beyond the question of jurisdiction. (1) Where there is a conflict of jurisdiction between a State and the United States; (2) where the authority and operations of the Federal Government are or may be interfered with by state action; (3) where rights or obligations of the United States under a treaty are involved; (4) where the petitioner is held under state process based upon state law which is in violation of the Constitution; and (5) where the judgment or order under which he is held is a nullity because in excess of the power of the court. This classification is based upon an analysis of *Henry* v. *Henkel,* 235 U. S. 228, and the cases there cited.

The first and second exceptions are closely related. The fundamental reason for the first four exceptions is the necessity of employing *habeas corpus* in order expeditiously and adequately to maintain the supremacy of federal laws and treaties in compliance with § 2 of Art. VI of the Constitution. See *Tarble's Case,* 13 Wall. 397; *Tennessee* v. *Davis,* 100 U. S. 257; *In re Neagle,* 135 U. S. 1; *In re Watts and Sachs,* 190 U. S. 1.

Illustrations of the first and second exceptions are *In re Loney,* 134 U. S. 372, explained in *New York* v. *Eno,* 155 U. S. 89; *Tarble's Case, supra; Boske* v. *Comingore,* 177 U. S. 459; *In re Neagle, supra,* and possibly *In re Watts and Sachs, supra.* These are cases of urgency.

The third exception, essential to assure the fulfillment of treaty obligations and the proper conduct of foreign

relations, is illustrated in *In re Mayfield*, 141 U. S. 107, and is commented upon in *Ex parte Royall*, 117 U. S. 241; *In re Neagle*, 135 U. S. 74; *Boske* v. *Comingore*, 177 U. S. 466; *In re Lincoln*, 202 U. S. 178.

As to the fourth exception, under which the validity of state laws, claimed to infringe the Federal Constitution, is sometimes tested on *habeas corpus*, *Ex parte Royall*, 117 U. S. 241, is the best example. The power of the court in this class of cases is purely discretionary. This subject is also discussed and the cases are collected in *In re Lincoln*, 202 U. S. 178.

In these four exceptional classes of cases the writ of *habeas corpus* is employed whenever the federal courts are confronted with the duty of maintaining the supremacy of the laws, the treaties, and the Constitution of the United States against attack by the States. The applicant for the writ in these cases has no absolute right to it, except where it is expressly given by statute. The granting of this extraordinary relief rests in the court's discretion and is exercised sparingly and only in an emergency.

Examples of the fifth exception, which may be called cases involving excess of power, are *Ex parte Lange*, 18 Wall. 163; *Nielsen, Petitioner*, 131 U. S. 176; and *Ex parte Hudgings*, 249 U. S. 378. The petitioner strives to bring himself within this exception.

The *Hudgings Case* presents no analogy to the case at bar. In *Ex parte Lange*, 18 Wall. 163, the judgment was not merely erroneous but absolutely void; as also in *Nielsen, Petitioner*, 131 U. S. 176. *Ex parte Bridges*, 2 Woods, 248, was substantially identical in facts with the *Loney Case*, 134 U. S. 372. *In re Mayfield*, 141 U. S. 107, plainly comes within the third exception. *In re Watts and Sachs*, 190 U. S. 1, the Court took jurisdiction by certiorari, and employed *habeas corpus* in aid of its juris-

diction. Assuming, however, that the case were one of *habeas corpus* alone, there was a direct conflict between the state and federal courts. The case is therefore within the first exception.

There is another situation sometimes occurring on *habeas corpus* that it may be suggested constitutes an exception to the general rule. It is not an exception, but if it were, it could have no application to the case at bar. Where there is a lack of jurisdiction in the lower court or its judgment is void, an appellate court, authorized to review its action on writ of error, may grant relief by *habeas corpus*, instead of remitting the applicant to his remedy by writ of error. *Ex parte Siebold*, 100 U. S. 371. But such power can be exercised, as is clearly shown in the *Siebold Case*, only by a court having supervisory jurisdiction, from which a writ of error would lie, and only when the judgment assailed is void. 100 U. S. 375. See also *Ex parte Spencer*, 228 U. S. 652.

As heretofore indicated, the enumerated exceptions are merely the instances in which, because of the absence of other forms of remedy, it is necessary to resort to *habeas corpus* in order to assure the rights of persons restrained of liberty, and are in effect mere interpretations of § 753, Rev. Stats.

IV. Since the circuit court was abolished, a judge of the Circuit Court of Appeals has no power to grant the writ of *habeas corpus*. *Whitney* v. *Dick*, 202 U. S. 132; *McLish* v. *Roff*, 141 U. S. 666; *Lau Ow Bew* v. *United States*, 144 U. S. 55; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Ex parte Tracy*, 249 U. S. 551.

The so-called writ of *habeas corpus* was void. It is not addressed to anybody; it bears the seal of no court nor the signature of the clerk, and is merely signed "Martin T. Manton, U. S. C. J."

V. The order of Judge Manton was appealable to the Circuit Court of Appeals. That court regarded the order

discharging the petitioner from custody as an order of the district court, made by a judge sitting in that court, and therefore appealable. 282 Fed. 145. This conclusion, we submit, is sound in view of the facts shown by the record, and it is unnecessary to add anything to the reasoning on it of the judges of the Circuit Court of Appeals.

Even though the order be regarded as a judge's order, it was nevertheless appealable. *Webb* v. *York*, 70 Fed. 753; *United States* v. *Fowkes*, 53 Fed. 13; *Duff* v. *Carrier*, 55 Fed. 433; *In re Starr*, 56 Fed. 142; *United States* v. *Gee Lee*, 50 Fed. 271. *Carper* v. *Fitzgerald*, 121 U. S. 87, distinguished.

VI. Misuse of the writ of *habeas corpus* is becoming increasingly prevalent. This record presents the situation in a most aggravating form. Not only was there no attempt to review the conviction in the orderly manner prescribed by law, but, by deliberate avoidance of that method, an appeal to another judge was substituted, and the attempt was made to shape the proceedings so that no review of his decision could be had. The result has been intolerable delay, great and unnecessary expense, and an offender against the administration of justice still unpunished.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The opinions below are reported in 266 Fed. 230; 274 Fed. 177; 279 Fed. 900; 282 Fed. 138.

In October, 1919, petitioner Craig, Comptroller of New York City, wrote and published a letter to Public Service Commissioner Nixon, wherein he assailed United States District Judge Mayer because of certain action taken in receivership proceedings then pending. The United States District Attorney filed an information charging him with criminal contempt under § 268, Judicial Code.

Having heard the evidence, given the matter prolonged consideration and offered the accused opportunity to retract, on February 24, 1921—some fifteen months after the offense—Judge Mayer, holding the District Court, sentenced petitioner to jail for sixty days and committed him to the custody of the United States Marshal. Immediately, without making any effort to appeal, Craig presented his verified petition, addressed "To the Honorable Martin T. Manton, Circuit Judge of the United States," asking for a writ of *habeas corpus* and final discharge. The record of all evidence and proceedings before the District Court was annexed to or, by reference, made part of the petition. The judge promptly signed and issued the following writing, which bore neither seal of court nor clerk's attestation:

"The United States of America,
Second Judicial Circuit,
Southern District of New York. } ss.:

"We command you that the body of Charles L. Craig, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before Honorable Martin T. Manton, United States Circuit Judge for the Second Judicial Circuit, within the Circuit and District aforesaid, to do and receive all and singular those things which the said judge shall then and there consider of him in this behalf; and have you then and there this writ.

"Witness the Honorable Martin T. Manton, United States Circuit Judge for the Second Judicial Circuit, this 24th day of February, 1921, and in the 145th year of the Independence of the United States of America. Martin T. Manton, U. S. C. J."

The Marshal made return, and set up the contempt proceedings in the District Court along with the order of commitment. This was traversed; and Judge Manton heard the cause. He said and ruled—

"Was there a cause pending within the rule of contempt concerning libelous publications? A cause is pending when it is still open to modifications, appeal or rehearing and until the final judgment is rendered. Did the letter concern a cause pending? If it did not, it could not obstruct the administration of justice. The application before the court which is the subject matter of the letter was the matter of a co-receiver. As to this the court had definitely decided adverse to the Comptroller. The court's action was complete in respect to this matter. . . . The district judge pointed out, as did the information, that the whole railroad situation was before the court, since it was an equity proceeding, but it is not of this that the defendant wrote. This is fully corroborated by the testimony of the defendant. He also testified that he had no intention of obstructing the delivery of justice or misbehaving himself so as to obstruct the administration of justice. He stands convicted upon his letter alone and such inferences as may be drawn therefrom. His conviction rests upon an issue between the court and the defendant, and it is one of terminology or interpretation. There is no criminal intent discoverable from this record to support the interpretation placed upon it by the court, nor was there pending *sub judice* a proceeding before the court at the time the letter was written. The conclusion is irresistible that the court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty. The petition for discharge is granted."

"It is ordered that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York, in his office in the Post Office Building, in the Borough of Manhattan, City of New York, and that this order be recorded in said court."

Circuit Judge Hough allowed an appeal. Being of opinion that Circuit Judges, as such, are without power

to grant writs of *habeas corpus*, the Circuit Court of Appeals treated the cause as determined by the District Court, to which Judge Manton had been assigned, and held—"We find no reason why this case is not governed by the general rule that a habeas corpus proceeding cannot be used as a writ or error but must be limited to jurisdictional questions. . . . The sole question which could be considered in the habeas corpus proceedings was as to the jurisdiction of the District Judge. If he had jurisdiction of the person of the petitioner, Craig, and jurisdiction of the subject and authority to render the judgment which he pronounced, there was no right to inquire further in the habeas corpus proceedings, and no right to determine whether or not, in the exercise of that jurisdiction, the District Judge had committed error. If errors were committed, the law afforded a remedy therefor, but not by habeas corpus." It concluded that the District Court, Judge Mayer presiding, had jurisdiction of both offense and person, and reversed the order of discharge.

The court correctly held that United States Circuit Judges, as such, have no power to grant writs of *habeas corpus*.

Two sections of the Revised Statutes authorize the granting and issuing of such writs.

"Sec. 751. The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus.

"Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

The Judiciary Act of 1789 provided for the organization of Circuit Courts. Until 1869 they were presided over by District Judges and Justices of the Supreme Court. The Act of April 10, 1869, 16 Stat. 44, created the office

of Circuit Judge. "For each of the nine existing judicial circuits there shall be appointed a circuit judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit." This provision became part of—

Sec. 607, Rev. Stats. "For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court, allotted to the circuit. . . . Every circuit judge shall reside within his circuit."

The Act of March 3, 1911 (Judicial Code, §§ 289, 291, 297), abolished Circuit Courts, conferred their duties and powers upon the District Courts and specifically repealed § 607, Rev. Stats. It also repealed "all Acts and parts of Acts authorizing the appointment of United States circuit or district judges . . . enacted prior to February 1, 1911." Section 118, Judicial Code, provides—

"There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges; in the fourth circuit, two circuit judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. . . . The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided*, That nothing in this section shall be construed to prevent any circuit judge holding district court or serving in the commerce court, or otherwise, as provided for and authorized in other sections of this Act."

Sections 751 and 752, Rev. Stats., give authority to grant writs of *habeas corpus* only to judges and justices of the courts therein specified—Supreme, Circuit, and District. The Judicial Code abolished the Circuit Courts. Only justices of the Supreme Court and judges of District Courts remain within the ambit of the statute.

Section 18, Judicial Code. "Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court."

A duly executed writing designated and appointed Judge Manton "to hold a session of the District Court of the United States for the Southern District of New York for the trial of causes and the hearing and disposition of such ex parte and other business as may come before him during the period beginning February 21, 1921, and ending March 5, 1921." Petitioner's counsel took care to show this assignment and, responding to the motion that the judge should proceed as a District Court in hearing the application for petitioner's discharge, he stated—"Our position is, your Honor, that the writ is issued by you as a Circuit Judge. In addition thereto, you were designated formally under the statute, and under that form of designation you had the power and the duty in chambers of doing the acts and proceedings of a District Court Judge, and we therefore claim that there was super-added to your powers, if necessary, the powers and activities of a District Court Judge." And in the brief here counsel maintains, "In issuing the writ Circuit Judge Manton, in addition to his powers as a Circuit Judge, was exercising the powers of a District Judge under designation."

As Circuit Judges have no authority to issue writs of *habeas corpus*, Judge Manton acted unlawfully unless the proceeding was before him either as District Judge or as the District Court. The record shows he did not rely solely on his authority as Circuit Judge; and, considering his assignment and all the circumstances, we agree with the court below that he was exercising the

powers of the District Court. He was not a District Judge, but Circuit Judge assigned "to hold a session of the District Court."

If it be conceded that he acted as District Judge and not as the District Court, nevertheless his action was subject to review. *Webb* v. *York* (1896), 74 Fed. 753, holds that an appeal lies to the Circuit Court of Appeals from the final orders of a judge at chambers in *habeas corpus* proceedings. Notwithstanding *Hoskins* v. *Funk*, 239 Fed. 278, to the contrary, we approve the conclusion reached in *Webb* v. *York* and think it is supported by sound argument. The court said—

"The present motion to dismiss . . raises the question whether an appeal lies to this court from an order made by a district judge at chambers in a habeas corpus proceeding, directing the discharge of a prisoner. Prior to the act of March 3, 1891, creating circuit courts of appeals . . an appeal lay from such orders to the circuit court for the district by virtue of section 763, Rev. St. . . .

"'Sec. 763. From the final decision of any court, justice or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard. . . .'

"In the case of *United States* v. *Fowkes*, 53 Fed. 13, it was held that the act of March 3, 1891, *supra*, operated to divest the circuit courts of their appellate jurisdiction in habeas corpus cases, under section 763, and that by virtue of the provisions of the act of March 3, 1891, the various circuit courts of appeals had acquired the jurisdiction to review the decisions of district courts in habeas corpus cases that had previously been exercised by the circuit courts. This conclusion, we think, was fairly warranted by the following clause. . . .

"'Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any

district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established. . . .'

"See, also *Duff* v. *Carrier*, 55 Fed. 433.

"The result is that, unless the act of March 3, 1891, is construed as lodging in the circuit court of appeals the appellate jurisdiction, under section 763, from final decisions of district judges, that was previously exercised by the circuit courts, the right of appeal, plainly granted by that section, from final decisions of district judges at chambers in habeas corpus cases is lost, and becomes valueless, because no court has been designated to which appeals in such cases may be taken. We think it clear that it was not the purpose of Congress to thus legislate. If it had intended to abolish the right of appeal from the decisions of district judges in habeas corpus cases, it would doubtless have done so in plain and direct terms. The fact that the right of appeal was not thus abolished furnishes a persuasive inference that Congress intended to designate a court to hear and determine such appeals. In *McLish* v. *Roff*, 141 U. S. 661, 666, 12 Sup. Ct. 118, and in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 12 Sup. Ct. 517, it was said, in substance, by the supreme court of the United States that it was the purpose of the act of March 3, 1891, to distribute the entire appellate jurisdiction theretofore exercised by the federal courts between the supreme court of the United States and the circuit courts of appeals that were thereby established. This intent, we think, is plainly apparent from the terms of the act. Moreover, the act in question very much enlarged the right of appeal, and that was one of its chief objects. In no single instance, so far as we are aware,

was a previous right of appeal abolished. We think, therefore, that it may be fairly concluded that it was the intention of Congress to confer on the circuit courts of appeals the right to hear appeals from final orders made by district judges in habeas corpus cases, as well as to hear appeals from final decisions of district courts made in such cases. We can conceive of no reason why the right should be denied in the one case and granted in the other, and such we believe was not the intent of the lawmaker. In the case of *United States* v. *Gee Lee*, 50 Fed. 271, it was held that the words 'the judge of the district court for the district' as used in an act of Congress, were equivalent to the words 'district court for the district.' By a similar latitude of construction, the intent being clear, we think that section 4 of the act of March 3, 1891, may be held to authorize an appeal to the United States circuit court of appeals from a final decision of a district judge at chambers in a habeas corpus case, as well as from a final decision of a district court."

See also *United States, Petitioner* 194 U. S. 194.

Carper v. *Fitzgerald*, 121 U. S. 87; *In re Lennon*, 150 U. S. 393; *McKnight* v. *James*, 155 U. S. 685; *Lambert* v. *Barrett*, 157 U. S. 697; *Harkrader* v. *Wadley*, 172 U. S. 148, are cited by petitioner to show that no appeal lay from the order discharging petitioner. These cases relate to the jurisdiction of this Court, not the Circuit Court of Appeals. The one first cited and most relied upon was decided in 1887. It recognizes the distinction between orders of a judge, as such, and decrees by the court. It denied the right to appeal here from a judge's order; it did not discuss the power of Circuit Courts to review such orders. The later cited cases go no further than to hold that appeals do not lie to this Court from orders by judges at chambers.

Although in point, we cannot agree with *Ex parte Jacobi*, 104 Fed. 681, where the opinion of the Circuit

Judge attempts to support denial of an appeal to the Circuit Court of Appeals from an order granted at chambers.

The court below had jurisdiction of the appeal.

On the merits, there is nothing unusual about the cause now before us. Unlike *Ex parte Hudgings*, 249 U. S. 378, 384, it cannot be regarded as "an exception to the general rules of procedure." Nor do we think it presents circumstances sufficiently extraordinary to bring it within any class of "exceptional cases." *Henry* v. *Henkel*, 235 U. S. 219, 228.

The matter heard by Judge Mayer was an ordinary contempt proceeding and *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, is enough to show that the District Court had power to entertain it, decide whether the evidence established an offense within the statute and determine petitioner's guilt or innocence. When the latter found himself aggrieved by the decree his remedy by appeal was plain. Neglecting that course, he asked a single judge to review and upset the entire proceedings, and now claims there was no appeal from the favorable order. As tersely stated by Judge Hough, "there is no new matter in this record attacking jurisdiction; what really happened was that the case was tried over again, and the so-called writ was no more than a device for obtaining a new trial." The course taken indicates studied purpose to escape review of either proceeding by an appellate court. Petitioner may not complain of unfortunate consequences to himself.

The Circuit Court of Appeals correctly applied the well-established general rule that a writ of *habeas corpus* cannot be utilized for the purpose of proceedings in error. *Harlan* v. *McGourin*, 218 U. S. 442, 445; *Matter of Gregory*, 219 U. S. 210, 213, 217; *Glasgow* v. *Moyer*, 225 U. S. 420, 428, 429. Its decree is affirmed and the cause will be remanded to the District Court for the Southern District of New York with directions to vacate the order

releasing petitioner; discharge the writ; and take such further proceedings as may be necessary to carry this opinion into effect.

Affirmed.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this cause.

MR. CHIEF JUSTICE TAFT, concurring.

I concur fully in the opinion of the Court.

It is of primary importance that the right freely to comment on and criticise the action, opinions and judgments of courts and judges should be preserved inviolate; but it is also essential that courts and judges should not be impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgments, or of impairing the justice and impartiality of verdicts.

If the publication criticises the judge or court after the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended so that the carrying out of the court's judgment can not be thereby obstructed, the publication is not contempt and can not be summarily punished by the court however false, malicious or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel. If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in the carrying out of its orders and judgment, the court may, and it is its duty to protect the administration of justice by punishment of the offender for contempt.

The federal statute concerning contempts as construed by this Court in prior cases vests in the trial judge the jurisdiction to decide whether a publication is obstructive

or defamatory only. The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and if not successful in that court, to apply to this Court for an opportunity for a similar review here.

The petitioner and his counsel have made such a review impossible. Instead of pursuing this plain remedy for injustice that may have been done by the trial judge and securing by an appellate court a review of this very serious question on the merits, they sought by applying to a single judge of only coördinate authority for a writ of *habeas corpus* to release the petitioner on the ground that the trial judge was without jurisdiction to make the decision he did. This raised the sole issue whether the trial judge had authority to decide the question, not whether he had rightly decided it.

Relying on a decision of this Court made years ago when the statutory provisions were different from those which now apply, the petitioner and his counsel thought that if they could secure a decision from a single circuit judge releasing the petitioner, no appeal would lie from his decision and that thus resort to the appellate courts could be avoided. The single judge to whom they applied released the prisoner. They were, however, mistaken in supposing that no appeal lay from the judge's decision on the question of the trial court's jurisdiction. The Government prosecuted its appeal and the only issue presented in that review is the matter of the trial court's jurisdiction which the Circuit Court of Appeals and we uphold. In this way, the petitioner and his counsel threw

away opportunity for a review of the case on its merits in the Circuit Court of Appeals and in this Court in their purpose to make a short cut and secure final release through the act of a single judge. This is the situation the petitioner finds himself in and we are without power to relieve him.

MR. JUSTICE HOLMES, dissenting.

I think that the petitioner's resort to *habeas corpus* in this case was right and was the only proper course. Very possibly some of the cases confuse the principles that govern jurisdiction with those that govern merits. See *Fauntleroy* v. *Lum*, 210 U. S. 230, 235. But I think that this should be treated as a question of jurisdiction. The statute puts it as a matter of power, "The said courts shall have power . . . to punish . . . contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," etc. Jud. Code, § 268. I think that these words should be taken literally and that we do not need a better illustration of the need to treat them as jurisdictional and to confine the jurisdiction very narrowly than the present case. For we must not confound the power to punish this kind of contempts with the power to overcome and punish disobedience to or defiance of the orders of a court, although unfortunately both are called by the same name. That of course a court may and should use as fully as needed, but this, especially if it is to be extended by decisions to which I cannot agree, makes a man judge in matters in which he is likely to have keen personal interest and feeling although neither self-protection nor the duty of going on with the work requires him to take such a part. It seems to me that the statute on its face plainly limits the jurisdiction of the judge in this class of cases to those

where his personal action is necessary in a strict sense in order to enable him to go on with his work. But wherever the line may be drawn it is a jurisdictional line. "The jurisdiction attaches only when the suit presents a substantial claim under an act of Congress." *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.*, 252 U. S. 436, 441. *Ex parte Hudgings*, 249 U. S. 378.

I think that the sentence from which the petitioner seeks relief was more than an abuse of power. I think it should be held wholly void. I think in the first place that there was no matter pending before the Court in the sense that it must be to make this kind of contempt possible. It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published. The English cases show that the law of England at least is in accord with my view. *Metzler* v. *Gounod*, 30 Law Times R., N. S., 264. But if there had been, and giving the most unfavorable interpretation to all that the letter says, I do not see how to misstate past matters of fact of the sort charged here could be said to obstruct the administration of justice. Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice when the judge seemingly was willing to condone it if the petitioner would retract? Unless a judge while sitting can lay hold of any one who ventures to publish anything that tends to make him unpopular or to belittle him I cannot see what power Judge Mayer had to touch Mr. Craig. Even if feeling was tense there is no such thing as what Keating, J., in *Metzler* v. *Gounod* calls contingent contempt. A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some

later date, any more than he can for exciting public feeling against a judge for what he already has done.

MR. JUSTICE BRANDEIS concurs in this opinion.